TRI-COUNTY EQUIPMENT & LEASING, LLC, APPELLANT, *v.* ANGELA KLINKE, RESPONDENT.

No. 55121

June 28, 2012 286 P.3d 593

Appeal from a district court judgment entered on a jury verdict in a tort action. First Judicial District Court, Carson City; James Todd Russell, Judge.

Motorist brought action against owner of truck, seeking damages for injuries she had allegedly suffered after her vehicle was struck by a generator being towed by the truck. After granting motorist's motion in limine to exclude evidence of workers' compensation benefits motorist had received in California, and after a jury trial, the district court entered judgment on the verdict in motorist's favor. Truck owner appealed. The supreme court, HARDESTY, J., held that: (1) Nevada law had to be applied in determining issue of whether evidence of workers' compensation benefits was admissible, and (2) evidence of benefits was admissible under statutory exception to collateral source rule.

**Reversed and remanded.**

*Burton Bartlett & Glogovac, Ltd.*, and *Scott A. Glogovac, Gregory J. Livingston*, and *Michael A. Pintar*, Reno, for Appellant.

*Kilpatrick Johnston & Adler* and *Charles M. Kilpatrick*, Carson City, for Respondent.

1. ACTION.
   A conflict of law exists, requiring determination as to which law applies, when two or more states have legitimate interests in a particular set of facts in litigation, and the laws of those states differ or would produce different results in the case.
2. WORKERS' COMPENSATION.
   No conflict existed between Nevada law and California law, and thus, Nevada law had to be applied, on issue of whether evidence of workers' compensation benefits motorist had received in California for injuries she had suffered in Nevada motor vehicle accident were admissible in motorist's personal injury action seeking damages arising from accident; evidence was admissible under both Nevada statute governing admissibility of workers' compensation payments and under comparable section of California Labor Code. Cal. Lab. Code § 3855; NRS 616C.215(10).
3. WORKERS' COMPENSATION.
   Evidence of workers' compensation benefits motorist had received in California for injuries she had suffered in motor vehicle accident in Nevada were admissible in motorist's personal injury action against owner of truck that was involved in accident, under statute governing admissibility of workers' compensation payments, as an exception to collateral source rule. NRS 616C.215(10).

4. WORKERS' COMPENSATION.
   The primary purpose of statute providing that evidence of workers' compensation payments is admissible in any trial of an action by the injured employee is to avoid confusing the jury about the payment and nature of workers' compensation benefits and their relation to the damages awarded. NRS 616C.215(10).
5. DAMAGES.
   The collateral source rule, barring the admission of a collateral source of payment for an injury into evidence for any purpose, applies if an injured party received some compensation for his or her injuries from a source wholly independent of the tortfeasor.

Before the Court EN BANC.

## OPINION

By the Court, HARDESTY, J.:

In this appeal, we consider whether proof of California workers' compensation payments can be admitted into evidence in a personal injury action in Nevada. Because Nevada, the forum state, and California, the state in which the payments were made, both have statutes that permit proof of workers' compensation payments to be allowed into evidence in personal injury actions, we conclude that Nevada law governs. Applying Nevada law, we conclude that evidence of the actual amount of workers' compensation benefits paid should have been admitted and that a clarifying jury instruction provided by statute should have been given. We therefore reverse the judgment and remand for further proceedings.

### *FACTS AND PROCEDURAL HISTORY*

Respondent Angela Klinke filed a complaint in a Nevada district court for personal injury against appellant Tri-County Equipment & Leasing, LLC, after a generator towed by a Tri-County truck in Nevada struck Klinke's vehicle, injuring her. At the time of the accident, Klinke was a California resident acting in the course and scope of her employment with her California employer. For her injuries, Klinke received California workers' compensation benefits through her employer. Pursuant to negotiations between the workers' compensation carrier and Klinke's medical providers, Klinke's medical providers allegedly accepted as full payment for their services an amount less than the amount stated in their bills; these types of negotiated discounts are often referred to as ''write-downs.''

Prior to trial, Klinke and Tri-County filed motions in limine regarding the workers' compensation payments and medical expense write-downs. Klinke sought, in relevant part, to exclude evidence of the workers' compensation payments and write-downs

under the collateral source rule, which bars evidence of payments for injuries made by an independent third party, and she argued that NRS 616C.215, the Nevada statute governing admissibility of workers' compensation payments, did not apply. Conversely, Tri-County argued in its own motion that Klinke's workers' compensation payments were admissible under NRS 616C.215. Tri-County also argued, in opposition to Klinke's motion, that ''evidence of California workers[']compensation payments and/or other benefits is admissible under both Nevada and California law as an exception to the collateral source rule.'' Equating NRS 616C.215 to a provision in the California Labor Code, Tri-County maintained that ''just as Nevada provides a mechanism for the full recovery of all monies paid on behalf of an employee for a workers[']compensation claim, so does California.'' The district court summarily concluded, without citation to legal authority, that NRS 616C.215 did not apply because Klinke had received payments pursuant to California's, rather than Nevada's, workers' compensation scheme. Inexplicably, after addressing NRS 616C.215, the district court failed to address the applicability of California law, despite Tri-County's argument that Klinke's workers' compensation payments were admissible ''under *both* California *and* Nevada law.''[1] (Emphases added).

After the trial concluded, a jury awarded Klinke damages in the total principal amount of $27,510. The special jury verdict form stated that the award included $17,510 for medical expenses; however, pursuant to the negotiated write-downs, Klinke's medical providers accepted substantially less as full payment for their services. Tri-County subsequently moved the district court to reduce the jury's verdict on the medical cost damages to the amount actually paid, but the district court denied the motion. This appeal followed.

## *DISCUSSION*

On appeal, Tri-County repeats its view that ''under both California and Nevada law, evidence of worker[s']compensation payments is admissible as an exception to the collateral source rule,'' which generally renders evidence of a collateral source of payment for an injury inadmissible. *Proctor v. Castelletti*, 112 Nev. 88, 90, 911 P.2d 853, 854 (1996). Because both Nevada, the forum state, and California, the state in which the payments were made, have an interest in this case, and Tri-County addresses the outcome

[1]Tri-County subsequently filed a motion for the district court to reconsider its decision, which Klinke opposed. Notably, Tri-County again argued that Klinke's arguments failed under both Nevada and California law, but the district court summarily reiterated that NRS 616C.215 did not apply without addressing the applicability of California law.

under the law of both states, we examine whether a conflict-of-law analysis is necessary. This issue is a question of law and the district court's decision that NRS 616C.215 did not apply must be reviewed de novo. *See Stephans v. State*, 127 Nev. 712, 716, 262 P.3d 727, 730 (2011); *see also Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 775, 121 P.3d 599, 602 (2005).

[Headnotes 1, 2]

When the laws of more than one state potentially apply, before undertaking a conflict-of-law analysis, a court should determine whether a conflict of law actually exists. 15A C.J.S. *Conflict of Laws* § 30 (2012). *See, e.g.*, *Johnson v. Nextel Communications, Inc.*, 660 F.3d 131, 138 (2d Cir. 2011); *Estate of Doe v. Islamic Republic of Iran*, 808 F. Supp. 2d 1, 20 (D.D.C. 2011); *Edifecs Inc. v. TIBCO Software Inc.*, 756 F. Supp. 2d 1313, 1317 (W.D. Wash. 2010). ''A conflict of law exists when two or more states have legitimate interests in a particular set of facts in litigation, and the laws of those states differ or would produce different results in the case.'' *AIG Premier Ins. Co. v. RLI Ins. Co.*, 812 F. Supp. 2d 1315, 1321 (M.D. Fla. 2011) (internal quotations omitted). ''If there is no conflict, no further analysis is necessary, and *the law of the forum state usually applies*.'' 15A C.J.S. *Conflict of Laws* § 30 (2012) (emphasis added); *Edifecs*, 756 F. Supp. 2d at 1317. While both Nevada and California have legitimate interests in this case, as Tri-County argues, evidence of Klinke's workers' compensation payments would be admissible under the law of either state. *See* NRS 616C.215(10); Cal. Lab. Code § 3855 (West 2011).[2] As such, there is no conflict, and Nevada law applies even though Klinke received California workers' compensation payments.[3]

[Headnote 3]

The collateral source doctrine does not change this result. As noted, this court has adopted ''a *per se* rule barring the admission of a collateral source of payment for an injury into evidence for any purpose.'' *Proctor*, 112 Nev. at 90, 911 P.2d at 854. However,

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[2]Tri-County argued below and on appeal that California Labor Code section 3856 applies. However, that statute addresses liens, not the admissibility of benefits received by an injured employee.

[3]In its order, the district court refused to apply Nevada workers' compensation law because the workers' compensation payments were made in California. However, the district court did not address the application of California law. Even if a conflict existed, Nevada law would apply because the statutory provision at issue, NRS 616C.215(10), is an evidentiary rule. *See Cramer v. Peavy*, 116 Nev. 575, 580, 3 P.3d 665, 669 (2000) (explaining that NRS 616C.215(10) relates to what a jury can consider); *see also* Restatement (Second) of Conflict of Laws § 138 (1971) (''The local law of the forum determines the admissibility of evidence.'').

Nevada recognizes a limited exception to the collateral source rule for workers' compensation payments. In *Cramer v. Peavy*, this court expressly held that NRS 616C.215(10) creates an exception to the collateral source rule. 116 Nev. 575, 580, 3 P.3d 665, 669 (2000). Pursuant to NRS 616C.215(10), ''[i]n *any* trial of an action by the injured employee . . . against a person other than the employer or a person in the same employ, the jury must receive proof of the amount of all payments made or to be made by the *insurer* or the Administrator [of the Division of Industrial Relations].'' (Emphases added.) The court must then instruct the jury to follow the court's damages instructions without reducing any award by the amount of workers' compensation paid, thus leaving unaltered the general substantive law on calculating damages. The jury instruction language specifically suggested by the statute reads:

> Payment of workmen's compensation benefits by the insurer, or in the case of claims involving the Uninsured Employers' Claim Account or a subsequent injury account the Administrator, is based upon the fact that a compensable industrial accident occurred, and does not depend upon blame or fault. If the plaintiff does not obtain a judgment in his or her favor in this case, the plaintiff is not required to repay his or her employer, the insurer or the Administrator any amount paid to the plaintiff or paid on behalf of the plaintiff by the plaintiff's employer, the insurer or the Administrator.
>
> If you decide that the plaintiff is entitled to judgment against the defendant, you shall find damages for the plaintiff in accordance with the court's instructions on damages and return your verdict in the plaintiff's favor in the amount so found without deducting the amount of any compensation benefits paid to or for the plaintiff. The law provides a means by which any compensation benefits will be repaid from your award.

NRS 616C.215(10). We have previously recognized that this statute benefits both the plaintiff and the defendant by preventing jury speculation as to workers' compensation benefits received. *See Cramer*, 116 Nev. at 581, 3 P.3d at 669.

NRS 616C.215(10)'s application to ''*any* trial'' gives the statute universal applicability to trials involving a plaintiff receiving workers' compensation payments, at least when the plaintiff is required to first use any recovery to reimburse the insurer for amounts paid.

The Supreme Court of North Carolina addressed a similar issue in *Frugard v. Pritchard*, 450 S.E.2d 744 (N.C. 1994). In that case, the plaintiff was permitted to exclude from her North Carolina trial evidence of Virginia workers' compensation payments that she received as a result of an accident in North Carolina. *Id*. at 744-45.

On appeal, the court addressed whether it ''should hold that under [North Carolina's] case law, evidence of out-of-state worker[s'] compensation payments is not admissible when by statute evidence of in-state payments is admissible.''[4] *Id.* at 746. The court saw ''nothing in the distinction between the[ ] two situations that ma[de] a difference.'' *Id.* Thus, believing that North Carolina ''should have a uniform rule,'' the court concluded ''that evidence of out-of-state worker[s'] compensation payments [was] admissible in actions against third parties.'' *Id.*

[Headnote 4]

In this case, because the primary purpose of the statute is to avoid confusing the jury about the payment and nature of workers' compensation benefits, and their relation to the damages awarded, *Cramer*, 116 Nev. at 580-81, 3 P.3d at 669, the statute should not be construed so narrowly as to apply only to Nevada workers' compensation benefits, thus defeating the statute's purpose in cases in which those benefits have been paid under another state's laws. Nothing in NRS 616C.215(10) precludes its applicability to cases in which workers' compensation payments were made under another state's similar system. In a trial governed by Nevada law, the workers' compensation payments made to an injured employee must be admitted as evidence and the proper instruction regarding the jury's consideration of those payments must be given. The benefits received by both parties in Nevada courts under Nevada law remain the same whether the payments were made under this state's or another state's statutes, and there is no logical reason to treat them differently.[5] Thus, pursuant to NRS 616C.215(10), the evidence of the amounts actually paid should have been admitted and the clarifying instruction given.

[Headnote 5]

Because the amount of workers' compensation payments actually paid necessarily incorporates the written down medical expenses, it is not necessary to resolve whether the collateral source rule applies to medical provider discounts in other contexts.[6]

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[4]The applicable North Carolina statute required, in relevant part, that '' '[t]he amount of compensation . . . paid or payable on account of such injury or death shall be admissible in evidence in any proceeding against the third party.' '' *Frugard v. Pritchard*, 450 S.E.2d 744, 745 (N.C. 1994) (alterations in original) (quoting N.C. Gen. Stat. § 97-10.2(e)).

[5]Indeed, Tri-County argued below that Klinke's employer ''has locations in both Nevada and California and that its workers[' ] compensation carrier is the same for both states.''

[6]This court solicited briefing from the parties on the applicability of the collateral source rule to medical provider discounts in other types of cases. The collateral source rule applies '' 'if an injured party received some compensation for his injuries from a source wholly independent of the tort-

*See Sparks v. State*, 121 Nev. 107, 110-11, 110 P.3d 486, 488 (2005) (''Where legislative intent can be clearly discerned from the plain language of the statute, it is the duty of this court to give effect to that intent and to effectuate, rather than nullify, the legislative purpose.''). We reverse the judgment of the district court and remand for further proceedings consistent with this opinion. *See Carver v. El-Sabawi*, 121 Nev. 11, 14, 107 P.3d 1283, 1285 (2005) (explaining that ''a judgment will . . . be reversed by reason of an erroneous [jury] instruction, [if] upon consideration of the entire case, including the evidence, it appears that such error has resulted in a miscarriage of justice'').

DOUGLAS, SAITTA, PICKERING, and PARRAGUIRRE, JJ., concur.

GIBBONS, J., with whom CHERRY, C.J., agrees, concurring:

The two main issues raised by the parties in this appeal are whether Nevada's collateral source rule applies to the payment of California workers' compensation benefits to Klinke and whether it applies to medical provider discounts. I concur with the majority's decision to reverse the district court judgment. The district court should have addressed California workers' compensation law since Klinke received California workers' compensation benefits. While I also concur with footnote 6 in the majority opinion in that

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feasor . . . .' '' *Proctor v. Castelletti*, 112 Nev. 88, 90 n.1, 911 P.2d 853, 854 n.1 (1996) (quoting *Hrnjak v. Graymar, Incorporated*, 484 P.2d 599, 602 (Cal. 1971)). Several courts have addressed the applicability of the collateral source rule to medical provider discounts in cases other than workers' compensation payments. *Compare Aumand v. Dartmouth Hitchcock Medical Center*, 611 F. Supp. 2d 78, 91-92 (D.N.H. 2009) (applying New Hampshire Law); *Lopez v. Safeway Stores, Inc.*, 129 P.3d 487, 496 (Ariz. Ct. App. 2006); *Montgomery Ward & Co., Inc. v. Anderson*, 976 S.W.2d 382, 385 (Ark. 1998); *Mitchell v. Haldar*, 883 A.2d 32, 40 (Del. 2005); *Goble v. Frohman*, 848 So. 2d 406, 409-10 (Fla. Dist. Ct. App. 2003); *Dyet v. McKinley*, 81 P.3d 1236, 1238-39 (Idaho 2003), *abrogated on other grounds by Verska v. St. Alphonsus Regional Med. Ctr.*, 265 P.3d 502, 507-09 (Idaho 2011); *Wills v. Foster*, 892 N.E.2d 1018, 1032-33 (Ill. 2008); *Haygood v. De Escabedo*, 356 S.W.3d 390, 398 (Tex. 2011), *with Howell v. Hamilton Meats & Provisions, Inc.*, 257 P.3d 1130, 1138 (Cal. 2011); *Stanley v. Walker*, 906 N.E.2d 852, 856-57 (Ind. 2009); *Martinez v. Milburn Enterprises, Inc.*, 233 P.3d 205, 229 (Kan. 2010); *Robinson v. Bates*, 857 N.E.2d 1195, 1202 (Ohio 2006); *Haselden v. Davis*, 579 S.E.2d 293, 294 (S.C. 2003). From these competing authorities, it is apparent that there are numerous reasons for medical provider discounts, including discounts that result when an injured party's insurance company has secured medical provider discounts as part of the health insurance plan. At least in those circumstances, such benefits may reside within the scope of the collateral source rule, although that is a legal issue we leave for a case that requires its determination. Whether the collateral source rule applies to other types of medical expense discounts would require evidence of the reason for the discount and its relationship to the third-party payment.

medical provider discounts appear to reside within the scope of Nevada's collateral source rule, I would address this issue since the parties briefed and argued it in both the district court and this court. In doing so, I conclude that Nevada's collateral source rule bars the admission of evidence showing medical provider discounts or ''write-downs.''

Nevada's collateral source rule is a *per se* rule that bars the introduction of evidence that a plaintiff has received compensation for his or her injuries from a third party wholly independent of the tortfeasor. *Proctor v. Castelletti*, 112 Nev. 88, 90 & n.1, 911 P.2d 853, 854 & n.1 (1996); *see also Winchell v. Schiff*, 124 Nev. 938, 945-46, 193 P.3d 946, 951 (2008); *Bass-Davis v. Davis*, 122 Nev. 442, 453-54, 134 P.3d 103, 110 (2006). *Proctor* dealt with a personal injury lawsuit in which the district court permitted the defendant to admit evidence of the plaintiff's disability insurance payments. 112 Nev. at 89, 911 P.2d at 853. In *Proctor*, we adopted ''a *per se* rule barring the admission of a collateral source payment for an injury into evidence for any purpose.'' *Id.* at 90, 911 P.2d at 854. In doing so, we followed the United States Supreme Court's lead, *Eichel v. New York Central Railroad Co.*, 375 U.S. 253 (1963), in concluding that ''[c]ollateral source evidence inevitably prejudices the jury because it greatly increases the likelihood that a jury will reduce a plaintiff's award of damages because it knows the plaintiff is already receiving compensation,'' and therefore, ''the prejudicial impact of collateral source evidence *inevitably* outweighs the probative value of such evidence.'' *Proctor*, 112 Nev. at 90-91, 911 P.2d at 854 (further explaining that ''there is no circumstance in which a district court can properly exercise its discretion in determining that collateral source evidence outweighs its prejudicial effect''). Ultimately, we held that the district court erred in admitting evidence of disability insurance payments. *Id.* at 91, 911 P.2d at 854.

Likewise, in *Bass-Davis*, the district court, in an action seeking damages for lost wages, admitted evidence that Bass-Davis received a paycheck during her four-month leave of absence following surgery on an injury. 122 Nev. at 447, 134 P.3d at 106. We held that the district court erred in admitting evidence that Bass-Davis received compensation from her employer during a leave of absence. *Id.* at 454, 134 P.3d at 110-11. In doing so, we determined that the evidence of compensation damaged the jury's determination of Bass-Davis's credibility and prejudiced Bass-Davis's ability to receive fair compensation for injuries caused by the defendant. *Id.* at 454, 134 P.3d at 111.

''[T]he focal point of the collateral source rule is not whether an injured party has 'incurred' certain medical expenses. Rather, it is

whether a tort victim has received benefits from a collateral source that cannot be used to reduce the amount of damages owed by a tortfeasor.'' *Acuar v. Letourneau*, 531 S.E.2d 316, 322 (Va. 2000). In general, the medical provider and the third-party insurer paying the medical costs on behalf of the insured tort victim negotiate the write-downs. The reduced amounts are ''as much of a benefit for which [a plaintiff] paid consideration [in the form of insurance premiums] as are the actual cash payments made by his health insurance carrier to the health care providers. . . . [The write-downs] constitute 'compensation or indemnity received by a tort victim from a source collateral to the tortfeasor . . . .' '' *Id*. at 322-23 (quoting *Schickling v. Aspinall*, 369 S.E.2d 172, 174 (Va. 1988)). As a result, evidence of write-downs creates the same risk of prejudice that the collateral source rule is meant to combat. *See id*. at 322.

Evidence of payments showing write-downs is irrelevant to a jury's determination of the reasonable value of the medical services and will likely lead to jury confusion. *See Leitinger v. DBart, Inc.*, 736 N.W.2d 1, 18 (Wis. 2007) (noting that write-downs may ''bring complex, confusing side issues before the fact-finder that are not necessarily related to the value of the medical services rendered''). The write-downs reflect a multitude of factors mostly relating to the relationship between the third party and the medical provider, and not necessarily relating to the reasonable value of the medical services. *See Martinez v. Milburn Enterprises, Inc.*, 233 P.3d 205, 228 (Kan. 2010). Here, the evidence of the write-downs could have confused the jury because Tri-County itself was unsure of the amounts. The inconsistencies in the calculations presented to the district court, which Tri-County only clarified in its reply brief to this court, evidence this.

My conclusion that the collateral source rule bars the introduction of evidence showing medical provider discounts or write-downs is consistent with a majority of jurisdictions that have addressed this issue.[1] All of the jurisdictions that have concluded that

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[1]*See Aumand v. Dartmouth Hitchcock Medical Center*, 611 F. Supp. 2d 78, 91-92 (D.N.H. 2009); *Pipkins v. TA Operating Corp.*, 466 F. Supp. 2d 1255, 1261-62 (D.N.M. 2006); *Lopez v. Safeway Stores, Inc.*, 129 P.3d 487, 496 (Ariz. Ct. App. 2006); *Montgomery Ward & Co., Inc. v. Anderson*, 976 S.W.2d 382, 385 (Ark. 1998); *Tucker v. Volunteers of America Co. Branch*, 211 P.3d 708, 712-13 (Colo. App. 2008) (interpreting a statutory exception to Colorado's statutory collateral source rule); *Mitchell v. Haldar*, 883 A.2d 32, 40 (Del. 2005); *Hardi v. Mezzanotte*, 818 A.2d 974, 984-85 (D.C. 2003); *Olariu v. Marrero*, 549 S.E.2d 121, 123 (Ga. Ct. App. 2001); *Bynum v. Magno*, 101 P.3d 1149, 1162 (Haw. 2004); *Wills v. Foster*, 892 N.E.2d 1018, 1032-33 (Ill. 2008); *Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W.3d 676, 683-84 (Ky. 2005); *Bozeman v. State*, 879 So. 2d 692, 705-06 (La. 2004); *Brandon HMA, Inc. v. Bradshaw*, 809 So. 2d 611, 619-20 (Miss.

evidence of write-downs of medical expenses is inadmissible have done so pursuant to their common law collateral source rule, except Colorado and Oregon, which have statutory collateral source rules. *See Tucker*, 211 P.3d at 711-13; *White*, 219 P.3d at 583. While I recognize that there are other approaches to the admissibility of payments showing medical cost write-downs,[2] I agree with the holdings of the majority of jurisdictions that evidence of medical cost write-downs is inadmissible.

Further, when medical write-downs occur, one party is likely to receive a windfall. If the write-downs cause one party to receive a windfall, it should be the insured plaintiff, not the tortfeasor. *See Lopez v. Safeway Stores, Inc.*, 129 P.3d 487, 496 (Ariz. Ct. App. 2006) (‘‘ ‘Because the law must sanction one windfall and deny the other, it favors the victim of the wrong rather than the wrongdoer.’ ’’ (quoting *Acuar v. Letourneau*, 531 S.E.2d 316, 323 (Va. 2000)); *see also* Restatement (Second) of Torts § 920A cmt. b (1979) (‘‘[I]t is the position of the law that a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor.’’); 22 Am. Jur. 2d *Damages* § 392 (2012) (‘‘If there is a windfall, it is considered more just that the injured person profit rather than grant the wrongdoer relief from full responsibility for the wrongdoing.’’). Thus, Nevada’s collateral source rule bars the introduction of evidence of medical provider discounts or ‘‘write-downs.’’

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2001); *Brown v. Van Noy*, 879 S.W.2d 667, 676 (Mo. Ct. App. 1994); *White v. Jubitz Corp.*, 219 P.3d 566, 583 (Or. 2009); *Covington v. George*, 597 S.E.2d 142, 144-45 (S.C. 2004); *Papke v. Harbert*, 738 N.W.2d 510, 536 (S.D. 2007); *Radvany v. Davis*, 551 S.E.2d 347, 348 (Va. 2001); *Leitinger*, 736 N.W.2d at 18.

[2]*See, e.g.*, *Howell v. Hamilton Meats & Provisions, Inc.*, 257 P.3d 1130 (Cal. 2011) (upholding California’s common law requirement that the trial court adjust the amount of medical damages to ensure that a plaintiff does not receive more than what was actually paid to medical providers).

THE STATE OF NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY, FINANCIAL INSTITUTIONS DIVISION; AND GEORGE E. BURNS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY, FINANCIAL INSTITUTIONS DIVISION, APPELLANTS, *v.* NEVADA ASSOCIATION SERVICES, INC.; RMI MANAGEMENT, LLC; AND ANGIUS & TERRY COLLECTIONS, INC., RESPONDENTS.

No. 57470

August 2, 2012 294 P.3d 1223

Appeal from a district court order granting a preliminary injunction prohibiting appellants from enforcing its declaratory order and advisory opinion. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Collection agencies sought preliminary injunction prohibiting Nevada Department of Business and Industry, Financial Institutions Division, and its Commissioner from enforcing advisory opinion regarding appropriate amount of homeowners' association lien fees agencies could collect. The district court granted preliminary injunction. Department and Commissioner appealed. The supreme court, GIBBONS, J., held that: (1) Division lacked jurisdiction to issue advisory opinion regarding appropriate amount of homeowners' association lien fees, and (2) enforcement of opinion would have resulted in irreparable harm.

**Affirmed.**

*Catherine Cortez Masto*, Attorney General, and *Daniel D. Ebihara*, Deputy Attorney General, Carson City, for Appellants.

*Holland & Hart LLP* and *Patrick John Reilly* and *Nicole E. Lovelock*, Las Vegas, for Respondents.

1. INJUNCTION.
   A preliminary injunction is proper when the moving party can demonstrate that it has a reasonable likelihood of success on the merits and that it will suffer irreparable harm for which compensatory damages would not suffice. NRS 33.010.
2. APPEAL AND ERROR.
   The supreme court reviews a district court's grant of a preliminary injunction for an abuse of discretion and will reverse only when the district court's decision was based on an erroneous legal standard or on clearly erroneous findings of fact. NRS 33.010.
3. APPEAL AND ERROR.
   When the underlying issues in a motion for preliminary injunction involve questions of statutory construction, including the meaning and scope of a statute, the supreme court reviews those questions of law de novo. NRS 33.010.

4. COMMON INTEREST COMMUNITIES.

   Department of Business and Industry, the Financial Institutions Division, lacked jurisdiction to issue advisory opinion regarding the appropriate amount of homeowners' association lien fees that collection agencies could recover pursuant to statute governing liens against units of common-interest communities for assessments, where statute provided the Commission on Common Interest Communities and Condominium Hotels and the Real Estate Division of the Department of Business and Industry with the sole responsibility of determining what fees could be charged, the maximum amount of such fees, and whether the fees maintained a priority. NRS 116.3116, 649.051.

5. STATUTES.

   Wherever a power is conferred by statute, everything necessary to carry out the power and make it effectual and complete will be implied.

6. COMMON INTEREST COMMUNITIES.

   Permitting the Department of Business and Industry, Financial Institutions Division, to enforce advisory opinion regarding the appropriate amount of homeowners' association lien fees collection agencies could recover pursuant to statute governing liens against units of common-interest communities for assessments would have caused collection agencies irreparable harm, so as to warrant granting preliminary injunction to prevent enforcement, where enforcement of opinion would have resulted in instigation of disciplinary action against agencies, and disciplinary action would have been placed in public record. NRS 116.3116.

Before DOUGLAS, GIBBONS and PARRAGUIRRE, JJ.

## OPINION[1]

By the Court, GIBBONS, J.:

In this appeal, we review a district court order granting a preliminary injunction prohibiting appellants State of Nevada Department of Business and Industry, the Financial Institutions Division, and its Commissioner, George E. Burns (collectively, the Department), from enforcing its declaratory order and advisory opinion regarding the appropriate amount of homeowners' association lien fees respondents Nevada Association Services, Inc.; RMI Management, LLC; and Angius & Terry Collections, Inc. (collectively, NAS) can collect. Because the district court did not abuse its discretion in determining that the Department did not have jurisdiction to issue an advisory opinion regarding NRS Chapter 116 and that NAS would suffer irreparable harm if the Department enforced its opinion, we affirm the district court's order granting NAS's request for injunctive relief.

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[1]We affirmed the district court's order in an unpublished order entered May 23, 2012. Respondents and other interested parties subsequently filed motions to reissue the decision as a published opinion. NRAP 36(f). Cause appearing, we grant the motions. Accordingly, we issue this opinion in place of the prior unpublished order.

*FACTS AND PROCEDURAL HISTORY*

The Department is responsible for regulating the collection practices of collection agencies in the state of Nevada. The statutes pertaining to the regulation and licensing of collection agencies are found in NRS Chapter 649. The Department has the authority to issue advisory opinions ''as to the applicability of any [such] statutory provision.'' NRS 233B.120. A homeowners' association (or unit owners' association), which may act on behalf of a common-interest community, will often employ collection agencies to assist it with collecting assessments owed by homeowners within the community. The statutes governing common-interest communities and common-interest ownership are contained in NRS Chapter 116.

In November 2010, the Department issued an advisory opinion in which it, *inter alia*, interpreted certain statutes within NRS Chapter 116, in particular NRS 116.3116, and their importance in the Department's regulation of collection agencies. The primary question presented to the Department was as follows:

> Pursuant to NRS 116.3116, what portion of the lien, if any, is superior to the unit's first mortgage lender's security interest (''super priority lien'') and may the sum total of the super priority lien amount, whether it be comprised of assessments, fees, costs of collection or other charges, ever exceed 9 times the monthly assessment amount for common expenses based on the periodic budget adopted by the association pursuant to NRS [ ]116.3115 . . . ?

In addressing this question, the Department noted that the interpretation of provisions within NRS Chapter 116 was required but that it would only address this chapter as it related to collection agencies and the Fair Debt Collection Practices Act, 15 U.S.C. § 1692f (1996). The Department then went on to reference NRS 649.020(3)(a), stating that a collection agency includes

> ''a community manager while engaged in the management of a common-interest community or the management of an association of a condominium hotel if the community manager, or any employee, agent or affiliate of the community manager, performs or offers to perform any act associated with the foreclosure of a lien pursuant to NRS 116.31162 to 116.31168, inclusive, or 116B.635 to 116B.660, inclusive.''

Because the Department believed that homeowners' associations had not sufficiently fixed the amount of fees that collection agencies may charge, the Department concluded that the determination of the additional sums would have to be authorized by law in order to be collected by the collection agencies. In coming to its

conclusion as to what fees were authorized by law, the Department noted that any penalties, fees, and charges are enforceable as assessments, and that in order for a lien to maintain super priority,[2] it cannot be in an amount in excess of the value of the assessments that would have become due in a nine-month period preceding the institution of an action to enforce the lien. Furthermore, the Department found that in order for the additional fees to be valid, the fees must be approved by the homeowners' associations, not added independently by the collection agency. The Department concluded that

> [a] collection agency is limited to the total of nine (9) months of assessments for common charges on the amount it can collect pursuant to priority status provided in NRS 116.3116(2). This nine (9) month cap includes any additional fees, charges, interest, costs, penalties or fines which the association could apply towards a lien pursuant to NRS 116.3116.
>
> . . . Additionally, prior to the imposition of any additional fees, charges, penalty and interest to any assessment or fine by a collection agency, the association must expressly approve the fees, charges, penalty and interest pursuant to the provisions in its governing documents.

Less than one month after the Department issued its opinion, NAS filed its complaint and motion for preliminary injunction in district court. As prominent collection agencies, NAS has been involved in several lawsuits to determine its rights with respect to the types of liens described above and NAS's priority in the chain of title.

NAS's complaint was prompted by the threat that the Department would enforce its advisory opinion. NAS primarily argued that the Department lacked jurisdiction to issue advisory opinions interpreting provisions of NRS Chapter 116. In support of its request for a preliminary injunction, NAS argued that because the Department did not have jurisdiction to issue the advisory opinion, NAS would likely succeed on the merits of the case, and if the opinion was enforced, it would suffer irreparable harm.

Following a hearing, the district court granted NAS's request for a preliminary injunction. In its order, the court determined that neither NRS Chapter 649 nor NRS Chapter 116 authorized the Department to interpret the provisions of NRS Chapter 116. Conversely, the district court found that the Real Estate Division of

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[2]Priority status over certain types of encumbrances is granted to liens against units for delinquent assessments. NRS 116.3116(2); NRS 116.093 (defining ''unit'').

the Department of Business and Industry and the Commission for Common Interest Communities and Condominium Hotels (CCICCH) have exclusive jurisdiction to interpret and administer the provisions of NRS Chapter 116. Therefore, the court determined that only the Real Estate Division and the CCICCH could decide what fees homeowners' associations could add to the total assessments in filing a lien. Having determined that the Department lacked jurisdiction to issue the opinion, the district court concluded that NAS had sustained its burden to prove a likelihood of success on the merits. The court then found that NAS would suffer irreparable harm if the injunction did not issue because NAS would be faced with the threat of future litigation, public records showing that it had been subject to actions filed by the Department, and, finally, the prospect of temporarily losing its license to carry on collection activities. The Department now appeals the district court's order granting the preliminary injunction.

## *DISCUSSION*

The Department contends that the district court abused its discretion in enjoining it from enforcing its advisory opinion. The Department argues that NAS failed to show that it had a likelihood of success on the merits because the Department had jurisdiction to issue the advisory opinion. Further, it argues that NAS would not suffer irreparable harm because the administrative disciplinary process is a requirement of holding a license and irreparable harm cannot be based on the filing of an administrative complaint. We disagree.

### *Preliminary injunction*

[Headnotes 1-3]

A preliminary injunction is proper when the moving party can demonstrate that it has a reasonable likelihood of success on the merits and that it will suffer irreparable harm for which compensatory damages would not suffice. *See* NRS 33.010; *University Sys. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). We review a district court's grant of a preliminary injunction for an abuse of discretion and will reverse only when the district court's decision was based ''on an erroneous legal standard or on clearly erroneous findings of fact.'' *Boulder Oaks Cmty. Ass'n v. B & J Andrews*, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009) (internal quotations omitted). However, when the underlying issues in the motion for preliminary injunction ''involve[ ] questions of statutory construction, including the meaning and scope of a statute, we review . . . those questions [of law] de novo.'' *Nevadans for Prop. Rights v. Sec'y of State*, 122 Nev. 894, 901, 141 P.3d 1235, 1240 (2006).

*Reasonable likelihood of success on the merits*

[Headnote 4]

The Department's primary contention on appeal is that NAS failed to show that it had a likelihood of success on the merits because the Department had jurisdiction to issue an advisory opinion regarding NRS Chapter 116. In order for us to determine whether the Department had jurisdiction to issue such an advisory opinion, we must review several sections from NRS Chapters 649 and 116.

*NRS Chapter 649*

Under NRS 649.051, the commissioner of the Department is granted authority to administer and enforce the provisions of NRS Chapter 649 and may adopt ''such regulations as may be necessary to carry out the provisions of this chapter.'' NRS 649.053. The commissioner is also responsible for the issuance of licenses allowing collection agencies to operate within the state. NRS 649.075(1). NRS 649.375 describes which collection agency practices are prohibited. As such practices pertain to this case, collection agencies may not ''[c]ollect or attempt to collect any interest, charge, fee or expense incidental to the principal obligation unless . . . such [sums] a[re] authorized by law or [have been] agreed to by the parties.'' NRS 649.375(2)(a)-(b). And, if such violations occur, the Department may impose fines or, in more severe cases, suspend or revoke the license of a collection agency. NRS 649.395(1)-(3). Finally, as defined in NRS 649.020(3)(a), a collection agency may include a community manager[3] ''if the community manager, or any employee, agent or affiliate of the community manager, performs or offers to perform any act associated with the foreclosure of a lien pursuant to NRS 116.31162 to 116.31168, inclusive, or 116B.635 to 116B.660, inclusive.''

*NRS Chapter 116*

Article 3 of Chapter 116 contains provisions for the management of common-interest communities. Unit owners' associations may ''hire and discharge managing agents and other employees, agents and independent contractors,'' and may also ''make contracts and incur liabilities.'' NRS 116.3102(1)(c), (e). NRS 116.310313(1) also allows ''[a]n association [to] charge a unit's owner reasonable fees to cover the costs of collecting any past due obligation.'' This section also provides that ''[t]he [CCICCH] shall adopt regulations establishing the amount of the fees that an association may charge pursuant to this section.'' *Id.* (emphasis added). Additionally,

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[3]A community manager is ''a person who provides for or otherwise engages in the management of a common-interest community or the management of an association of a condominium hotel.'' NRS 116.023.

> [t]he provisions of th[e] section apply to any costs of collecting a past due obligation charged to a unit's owner, regardless of whether the past due obligation is collected by the association itself or by any person acting on behalf of the association, including, without limitation, . . . a community manager or a collection agency.

NRS 116.310313(2). The language of the two sections is clear in that the CCICCH is solely responsible for determining the type and amount of fees that may be collected by associations.

In its order granting the preliminary injunction, the district court pointed to additional statutes in NRS Chapter 116, which it believed supported a finding that only the Real Estate Division and the CCICCH could adopt regulations to supplement, as well as interpret, the statutory provisions of the chapter. NRS 116.615 provides, in pertinent part, for the administration and regulation of the chapter as follows:

> 1. The provisions of this chapter *must* be administered by the [Real Estate] Division, subject to the administrative supervision of the Director of the Department of Business and Industry.
>
> 2. [The CCICCH] and the [Real Estate] Division may do all things necessary and convenient to carry out the provisions of this chapter, including, without limitation, prescribing such forms and adopting such procedures as are necessary to carry out the provisions of this chapter.
>
> 3. [The CCICCH], or the [Real Estate] Administrator with the approval of the [CCICCH], may adopt such regulations as are necessary to carry out the provisions of this chapter.

(Emphasis added.) The language of this provision is clear that the CCICCH and the Real Estate Division are responsible for regulating and administering the chapter. There is no provision granting any other commission or department the authority to regulate or interpret the language of the chapter. NRS Chapter 116 also addresses the issuance of advisory opinions, stating that ''[t]he [Real Estate] Division shall provide by regulation for the filing and prompt disposition of petitions for declaratory orders and advisory opinions as to the applicability or interpretation of: (a) [a]ny provision of this chapter or chapter 116A or 116B of NRS.'' NRS 116.623(1)(a).

[Headnote 5]

The language of NRS 116.615 and NRS 116.623 is clear and unambiguous. Thus, we apply a plain reading. *See Westpark Owners' Ass'n v. Dist. Ct.*, 123 Nev. 349, 357, 167 P.3d 421, 427 (2007). We will also read NRS Chapter 116 and NRS Chapter 649 in a way that harmonizes them as a whole. *Southern Nev. Home-*

*builders v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). Based on a plain, harmonized reading of these statutes, the responsibility of determining which fees may be charged, the maximum amount of such fees, and whether they maintain a priority, rests with the Real Estate Division and the CCICCH. *See* NRS 116.615; NRS 116.623. Because the Real Estate Division is charged with adopting appropriate regulations concerning NRS Chapter 116, the regulations regarding the fees chargeable by community managers would then become ''authorized by law'' as required by NRS 649.375(2)(a).[4] *See* NRS 116.615; NRS 116.623. Allowing the Real Estate Division to adopt regulations concerning the amount collectible by community managers and allowing the Department to enforce those regulations, if the community managers act in derogation of those regulations, harmonizes the chapters in a way to give each its full effect. *See Southern Nev. Homebuilders*, 121 Nev. at 449, 117 P.3d at 173. Furthermore, the Department's enforcement of the regulations adopted by the Real Estate Division avoids the absurd result of having a regulation without someone with authority to enforce it because the Real Estate Division is not charged with enforcing its regulations. *See id.* We therefore determine that the plain language of the statutes requires that the CCICCH and the Real Estate Division, and no other commission or division, interpret NRS Chapter 116. Consequently, the Department lacked jurisdiction to issue an advisory opinion interpreting NRS Chapter 116. Therefore, the district court did not abuse its discretion in determining that NAS had a likelihood of success on the merits.

*Irreparable harm*

[Headnote 6]

The district court found that not only would the instigation of disciplinary action against NAS by the Department be harmful in and of itself, but also that any such disciplinary action would have the added harmful effect of placing the matter in the public record. It also found that even a temporary revocation of NAS's collection

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[4]The Department also argues that it had implied authority to examine NRS Chapter 116. Although it is true that ''wherever a power is conferred by statute, everything necessary to carry out the power and make it effectual and complete will be implied,'' *Checker, Inc. v. Public Serv. Comm'n*, 84 Nev. 623, 629-30, 446 P.2d 981, 985 (1968), this rule of statutory construction is inapplicable in this situation because the Department can rely on the interpretations and regulations of the Real Estate Division concerning NRS Chapter 116. The Department would not need to act on its own to properly effectuate its statutory powers. Further, if the Department determines that certain regulations should be enacted or that an interpretation of a provision is required, nothing prevents it from requesting the CCICCH and/or the Real Estate Division to so act.

license could lead to irreparable harm because it would be unable to conduct its business.

We have determined that ''acts committed without just cause which unreasonably interfere with a business or destroy its credit or profits, may do an irreparable injury.'' *Sobol v. Capital Management*, 102 Nev. 444, 446, 726 P.2d 335, 337 (1986); *see also Com. v. Yameen*, 516 N.E.2d 1149, 1151 (Mass. 1987) (''A licensee whose license has been revoked or suspended immediately suffers the irreparable penalty of loss of [license] for which there is no practical compensation.'' (alteration in original) (internal quotations omitted)).

Here, the district court found that the mere act of filing a disciplinary action against NAS would cause irreparable harm. In its findings, the district court explained that it was possible for the Department to revoke NAS's license without a hearing under its powers pursuant to NRS 649.395(2)(a), which allows the Department to revoke a collection license ''without notice and hearing if . . . necessary for the immediate protection of the public,'' and ''[t]he licensee is afforded a hearing to contest the suspension or revocation within 20 days'' thereafter. NRS 649.395(2)(b). Thus, if such an instance occurred, NAS would be unable to conduct any business during that time, not just on those liens that may contain unauthorized fees. The district court properly determined that the inability to conduct any business would cause irreparable harm. *Sobol*, 102 Nev. at 446, 726 P.2d at 337. It was within the district court's discretion to find that NAS would suffer irreparable harm because it was threatened with the prospect of losing its license to conduct business. Therefore, NAS sustained its burden, under NRS 33.010, to prove that it had a reasonable likelihood of success on the merits and that it would suffer irreparable harm for which compensatory damages would not suffice. Consequently, we determine that the district court did not abuse its discretion in granting NAS's request for injunctive relief, and we therefore affirm its order.[5]

DOUGLAS and PARRAGUIRRE, JJ., concur.

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[5]We have reviewed all of the Department's remaining contentions and conclude that they are without merit.

CERTIFIED FIRE PROTECTION, INC., A NEVADA CORPORATION, APPELLANT, *v.* PRECISION CONSTRUCTION, INC., A NEVADA CORPORATION; ARTHUR WIRTZ FAMILY LIMITED PARTNERSHIP, A FOREIGN LIMITED PARTNERSHIP; AND LIBERTY MUTUAL INSURANCE COMPANY, RESPONDENTS.

No. 54603

CERTIFIED FIRE PROTECTION, INC., A NEVADA CORPORATION, APPELLANT/CROSS-RESPONDENT, *v.* PRECISION CONSTRUCTION, INC., A NEVADA CORPORATION; ARTHUR WIRTZ FAMILY LIMITED PARTNERSHIP, A FOREIGN LIMITED PARTNERSHIP; AND LIBERTY MUTUAL INSURANCE COMPANY, RESPONDENTS/CROSS-APPELLANTS.

No. 55514

August 9, 2012 283 P.3d 250

Consolidated appeal from a district court judgment on partial findings and an appeal and cross-appeal from a post-judgment order awarding costs and denying a motion for attorney fees. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Fire protection system subcontractor brought action against general contractor for warehouse construction, owner, and surety on mechanic's lien release bond, seeking to foreclose mechanic's lien and seeking damages for unjust enrichment, quantum meruit, and breach of contract, relating to general contractor's termination of subcontract. At close of subcontractor's case-in-chief at bench trial, the district court granted defendants' motion for judgment on partial findings, expunged the mechanic's lien, and denied defendants' request for attorney fees. Subcontractor appealed and defendants cross-appealed. The supreme court, PICKERING, J., held that: (1) evidence did not establish an express contract for design-related work, (2) evidence did not establish a contract implied-in-fact, (3) evidence did not establish unjust enrichment, and (4) declining to award attorney fees to defendants under the offer of judgment statute and rule was not an abuse of discretion.

**Affirmed.**

*McDonald Carano Wilson LLP* and *David J. Stoft, Anthony D. Guenther*, and *Patrick J. Murch*, Las Vegas, for Appellant/Cross-Respondent.

*Prince & Keating* and *Dennis M. Prince, Bryce B. Buckwalter*, and *Douglas J. Duesman*, Las Vegas, for Respondents/Cross-Appellants.

1. TRIAL.
   In a bench trial, the district court may enter judgment on partial findings against a party when the party has been fully heard on an issue and judgment cannot be maintained without a favorable finding on that issue. NRCP 52(c).
2. TRIAL.
   On a motion for judgment on partial findings at a bench trial, the district court is not to draw any special inferences in the nonmovant's favor. NRCP 52(c).
3. TRIAL.
   On a motion for judgment on partial findings at a bench trial, since it is a nonjury trial, the court's task is to weigh the evidence. NRCP 52(c).
4. APPEAL AND ERROR.
   Where a question of fact has been determined by the district court, the supreme court will not reverse unless the judgment is clearly erroneous and not based on substantial evidence.
5. CONTRACTS.
   Basic contract principles require, for an enforceable contract, an offer and acceptance, meeting of the minds, and consideration.
6. CONTRACTS.
   A ''meeting of the minds'' exists when the parties have agreed upon the contract's essential terms.
7. CONTRACTS.
   Which terms are essential to a meeting of the minds, as required for an enforceable contract, depends on the agreement and its context and also on the subsequent conduct of the parties, including the dispute that arises and the remedy sought. Restatement (Second) of Contracts § 131 cmt. g.
8. APPEAL AND ERROR.
   Whether a contract exists is a question of fact, requiring the supreme court to defer to the district court's findings unless they are clearly erroneous or not based on substantial evidence.
9. CONTRACTS.
   Evidence that fire protection system subcontractor sent a progress bill to general contractor for warehouse construction, and that general contractor urged subcontractor to get started on designs, did not establish a meeting of the minds regarding essential terms for enforceable subcontract for design-related work; such evidence did not show a meeting of the minds regarding price, scope of work, and time for performance.
10. IMPLIED AND CONSTRUCTIVE CONTRACTS.
    Quantum meruit is a cause of action in two fields: restitution and contract. Restatement (Third) of Restitution and Unjust Enrichment § 31 cmt. e.
11. DAMAGES.
    Quantum meruit is applied in actions based upon contracts implied-in-fact.
12. CONTRACTS.
    A contract implied-in-fact must be manifested by conduct.
13. CONTRACTS.
    A contract implied-in-fact is a true contract that arises from the tacit agreement of the parties.

14. CONTRACTS.
    To find a contract implied-in-fact, the fact-finder must conclude that the parties intended to contract and promises were exchanged, the general obligations for which must be sufficiently clear, and it is at that point that a party may invoke quantum meruit as a gap-filler to supply the absent term.
15. DAMAGES.
    Where a contract implied-in-fact exists, quantum meruit ensures the laborer receives the reasonable value, usually market price, for the laborer's services. Restatement (Third) of Restitution and Unjust Enrichment § 31 cmt. e.
16. CONTRACTS.
    The evidence did not establish a contract implied-in-fact based on general contractor for warehouse construction intent to contract with subcontractor for design-related work for fire protection system and the parties exchanged promises; general contractor never agreed to a contract for only design-related work, parties never agreed to a price for that work, and they disputed the time of performance.
17. IMPLIED AND CONSTRUCTIVE CONTRACTS.
    Liability in restitution for the market value of goods or services is the remedy traditionally known as ''quantum meruit.'' Restatement (Third) of Restitution and Unjust Enrichment §§ 31 cmt. e, 49 cmt. f.
18. IMPLIED AND CONSTRUCTIVE CONTRACTS.
    Where unjust enrichment is found, the law implies a quasi-contract that requires the defendant to pay to the plaintiff the value of the benefit conferred; in other words, the defendant makes restitution to the plaintiff in quantum meruit.
19. IMPLIED AND CONSTRUCTIVE CONTRACTS.
    When a plaintiff seeks as much as he or she deserves based on a theory of restitution, as opposed to implied-in-fact contract, the plaintiff must establish each element of unjust enrichment.
20. IMPLIED AND CONSTRUCTIVE CONTRACTS.
    Quantum meruit is the usual measurement of unjust enrichment in cases where nonreturnable benefits have been furnished at the defendant's request, but where the parties made no enforceable agreement as to price. Restatement (Third) of Restitution and Unjust Enrichment § 49 cmt. f.
21. IMPLIED AND CONSTRUCTIVE CONTRACTS.
    The actual value of recovery in cases of unjust enrichment is usually the lesser of: (1) market value, or (2) a price the defendant has expressed a willingness to pay. Restatement (Third) of Restitution and Unjust Enrichment § 31 cmt. e.
22. IMPLIED AND CONSTRUCTIVE CONTRACTS.
    Quantum meruit is not the only measure of damages available in restitution. Restatement (Third) of Restitution and Unjust Enrichment § 49.
23. IMPLIED AND CONSTRUCTIVE CONTRACTS.
    ''Unjust enrichment'' exists when the plaintiff confers a benefit on the defendant, the defendant appreciates such benefit, and there is acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof.
24. IMPLIED AND CONSTRUCTIVE CONTRACTS.
    A pleading of quantum meruit for unjust enrichment does not discharge the plaintiff's obligation to demonstrate that the defendant re-

ceived a benefit from services provided. Restatement (Third) of Restitution and Unjust Enrichment § 31 cmt. e.

25. IMPLIED AND CONSTRUCTIVE CONTRACTS.
''Benefit'' in the unjust enrichment context can include services beneficial to or at the request of the other, and it denotes any form of advantage and is not confined to retention of money or property.

26. IMPLIED AND CONSTRUCTIVE CONTRACTS.
While restitution may strip a wrongdoer of all profits gained in a transaction with a claimant, principles of unjust enrichment will not support the imposition of a liability that leaves an innocent recipient worse off than if the transaction with the claimant had never taken place. Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. d.

27. IMPLIED AND CONSTRUCTIVE CONTRACTS.
General contractor for warehouse construction and owner were not unjustly enriched by design-related work performed by fire protection system subcontractor, when none of the work could be utilized by the replacement fire sprinkler subcontractor.

28. COSTS.
Declining to award attorney fees to general contractor, under the offer of judgment statute and rule, was not an abuse of discretion in subcontractor's action for breach of contract, quantum meruit, and unjust enrichment; the district court determined that the $7,501 offer of judgment, made shortly after general contractor filed its answer, was unreasonable in amount and was made so early in the litigation that subcontractor had not yet had a fair opportunity to assess its claims through discovery. NRS 17.115; NRCP 68.

29. COSTS.
There is no bright-line rule that qualifies an offer of judgment as per se reasonable in amount, for purposes of an award of attorney fees under the offer of judgment statute and rule; instead, the district court is vested with discretion to consider the adequacy of the offer and the propriety of granting attorney fees. NRS 17.115; NRCP 68.

30. COSTS.
Explicit findings on every *Beattie* factor is not required for the district court to adequately exercise its discretion regarding an award of attorney fees under the offer of judgment statute and rule. NRS 17.115; NRCP 68.

31. MECHANICS' LIENS.
Declining to award attorney fees to owner and general contractor under the mechanic's lien statute was not an abuse of discretion, though the district court expunged the mechanic's lien where subcontractor had a reasonable basis for pursuing a mechanic's lien claim. NRS 108.237(3).

Before CHERRY, C.J., GIBBONS and PICKERING, JJ.

## OPINION

By the Court, PICKERING, J.:

To recover in quantum meruit, a party must establish legal liability on either an implied-in-fact contract or unjust enrichment basis. Because we agree with the district court that appellant/cross-respondent Certified Fire Protection, Inc. did not provide sufficient

evidence to establish either an implied-in-fact contract or unjust enrichment, we affirm. Additionally, we affirm on cross-appeal the district court's order denying attorney fees.

I.

Respondent/cross-appellant Precision Construction, Inc., a general contractor pursuing a contract for a warehouse construction project in 2005, solicited bids from subcontractors for the design and installation of an early suppression, fast response sprinkler system.[1] Certified picked up a set of plans detailing the sprinkler system's requirements and, in mid-November, submitted a bid of $480,000. Precision notified Certified that it had won the bid, and Precision entered into a contract with the owner to complete the project.

On December 5, Certified obtained a copy of the subcontract along with a set of construction plans and sprinkler system specifications. The subcontract's provisions required Certified to complete the preliminary design drawings of the sprinkler system within two weeks and to obtain a certificate naming Precision as an additional insured. Over the next few weeks, Precision asked Certified several times to sign the subcontract and provide the additional-insured certificate.

Certified objected to the subcontract as imposing terms that differed from the bid specifications. It complained that the unanticipated terms changed the scope of work—including the size of pipes to be used, the placement of the fire riser, and the two-week time frame for producing drawings—and that it would have to amend its bid accordingly. Certified also took exception to some of the generic contractual provisions, including the additional-insured requirement.

On December 20, Precision notified all subcontractors, including Certified, that construction was under way. Certified hired Ron Dusky to draft the sprinkler system designs and, sometime in mid-January 2006, Dusky began drafting the designs. On January 19, with the subcontract still unsigned, Certified submitted a $33,575 progress bill to Precision, representing that it had completed seven percent of its work. But the design drawings apparently were still unfinished (or at least undelivered) because six days later, Precision wrote Doug Sartain, Certified's owner, requesting the sprinkler plans ''ASAP'' and advising that Precision would not process the progress payment without a signed subcontract. The next day, January 26, Precision again contacted Sartain, asking

[1]Respondents/cross-appellants include Arthur Wirtz Family Limited Partnership (owner of the property) and Liberty Mutual Insurance Company (surety on mechanic's lien release bond). We will refer to respondents/cross-appellants, collectively, as Precision.

whether Certified planned to continue with the project and notifying him that its delay in submitting the plans was delaying the whole project.

On January 27, Certified reiterated its objections to the subcontract but assured Precision that it had begun the fire protection drawings. Certified completed the design work and submitted the sprinkler system drawings on February 1. Precision and Certified communicated several more times about getting the subcontract signed, and, on February 8, Precision learned that the drawings contained errors that needed correcting. It again asked Certified about the unsigned subcontract.

On February 16, Precision terminated its relationship with Certified for refusing to sign the subcontract, for not providing the additional-insured endorsement, and for incorrect designs. At Precision's request, Certified submitted an itemized billing for the work it had performed; its bill reported costs of $25,185.04, which included design work and permit fees for the project. Precision deemed the costs too high and never paid. Certified placed a mechanic's lien on the property and sued to recover for its design-related work. Certified's complaint sought to foreclose the mechanic's lien and damages for unjust enrichment, quantum meruit, and breach of contract.

The case proceeded to a bench trial, where Certified provided documentary evidence and the testimony of Certified owner Doug Sartain, Certified employee Gary Wooldridge, and the deposition testimony of Dusky, who drew the designs. At the close of Certified's case-in-chief, Precision moved for judgment on partial findings pursuant to NRCP 52(c). The district court granted the motion and expunged the mechanic's lien. The district court found that no contract existed, and that Certified's claim for ''quantum meruit has not been established based upon the fact that the design materials could not be utilized by [Precision].'' For the same reason—failure to show that Precision had benefited from the design drawings—the court concluded that Precision had not been unjustly enriched. After entry of judgment, Precision moved for attorney fees under NRS 17.115 and NRS 108.237, which the district court denied.

On appeal, Certified argues that the district court failed to determine whether a contract for the design-only work existed but concedes that the parties never reached agreement on the full design and installation contract. Certified also asserts error in the district court's conclusion that Precision was neither unjustly enriched nor liable to Certified in quantum meruit because Precision did not benefit from the work performed. On cross-appeal, Preci-

sion argues that the district court abused its discretion in denying Precision's motion for attorney fees.

## II.

[Headnotes 1-4]

NRCP 52(c) allows the district court in a bench trial to enter judgment on partial findings against a party when the party has been fully heard on an issue and judgment cannot be maintained without a favorable finding on that issue. Although Certified argues otherwise, in entering a Rule 52(c) judgment, ''[t]he trial judge is not to draw any special inferences in the nonmovant's favor''; ''since it is a nonjury trial, the court's task is to weigh the evidence.'' 9C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2573.1, at 256-60 (3d ed. 2008) (addressing NRCP 52(c)'s federal cognate, Fed. R. Civ. P. 52(c)); *see* Robert E. Jones et al., *Rutter Group Practice Guide: Federal Civil Trials and Evidence* § 17:92 (2011) (''Because the court acts as the factfinder when ruling on a [motion] for judgment on partial findings, it need *not* consider the evidence in a light favorable to the nonmoving party . . . .''). ''Where a question of fact has been determined by the trial court, this court will not reverse unless the judgment is clearly erroneous and not based on substantial evidence.'' *Kockos v. Bank of Nevada*, 90 Nev. 140, 143, 520 P.2d 1359, 1361 (1974).

In granting Precision's motion for judgment on partial findings, the district court found that ''there was no meeting of the minds on the material contractual terms . . . sufficient to form . . . [a] contract,'' and that the work Certified did could not be used by Precision and thus ''conveyed no value'' to Precision. It concluded ''(1) that Certified Fire's claim of unjust enrichment has not been established based upon the fact that [Precision] did not unjustly retain any money or property because no work performed could be utilized by the replacement fire sprinkler subcontractor; and (2) that Certified Fire's claim for quantum meruit has not been established based upon the fact that the design materials could not be utilized by [Precision].''

Certified argues that the district court ''erred by focusing on a contract that Certified Fire is not seeking to enforce.'' It asserts that the court evaluated whether the full contract—for design and installation work comprising the $480,000 bid—was enforceable. But Certified conceded in the district court that no such contract existed. Instead, Certified maintains it had either an express or implied contract for the design work only, entitling it to damages or recovery in quantum meruit for the design work alone.

A.

We first address Certified's express contract claim.

[Headnotes 5-8]

''Basic contract principles require, for an enforceable contract, an offer and acceptance, meeting of the minds, and consideration.'' *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). A meeting of the minds exists when the parties have agreed upon the contract's essential terms. *Roth v. Scott*, 112 Nev. 1078, 1083, 921 P.2d 1262, 1265 (1996). Which terms are essential ''depends on the agreement and its context and also on the subsequent conduct of the parties, including the dispute which arises and the remedy sought.'' Restatement (Second) of Contracts § 131 cmt. g (1981). ''[W]hether a contract exists is [a question] of fact, requiring this court to defer to the district court's findings unless they are clearly erroneous or not based on substantial evidence.'' *May*, 121 Nev. at 672-73, 119 P.3d at 1257.

[Headnote 9]

Certified argues that the progress bill it sent to Precision established the price term and Precision's urging that Certified get started on the designs established the scope of work for the express design-work-only contract it claims.[2] But the record does not establish that Precision agreed to pay a sum certain for the design-related work. Certified's $33,575 progress bill—which represented seven percent of the whole subcontract—went unpaid, and Precision told Certified it would not make a progress payment until the whole subcontract had been executed. Beyond this, witness testimony established that a party in Precision's position would not execute a contract for only design drawings; such drawings are specifically tailored for the company rendering them and not useful to another installer. Thus, Certified's argument that Precision was parceling out the work—with Certified doing the designs only—makes no sense.

Not only were price and scope of work terms missing from the claimed design-work contract, the parties never agreed to a time for performance. Certified objected to Precision's proposed two-week timeline for producing the design drawings as ''not realistic,'' and the parties never agreed to another time frame. That the time-for-performance term mattered is demonstrated by Precision's repeated prompting of Certified to complete the designs and Certi-

[2]To support its theory that the parties entered into an express contract, Certified cites to *Gulf Oil Corp. v. Clark County*, 94 Nev. 116, 575 P.2d 1332 (1978). In that case, we noted that a subcontractor's written bid is an offer, and accepting that bid constitutes acceptance. *Id.* at 118, 575 P.2d at 1333. This line of reasoning might support enforcement of the whole subcontract, but Certified concedes that this contract was never formed.

fied's refusal to bind itself to Precision's desired two-week turnaround. ''When essential terms such as these have yet to be agreed upon by the parties, a contract cannot be formed.'' *See Nevada Power Co. v. Public Util. Comm'n*, 122 Nev. 821, 839-40, 138 P.3d 486, 498-99 (2006).

And while the district court's judgment on partial findings does not reference a design-only contract, the record substantially supports its conclusion that no enforceable contract existed. *Luciano v. Diercks*, 97 Nev. 637, 639, 637 P.2d 1219, 1220 (1981) (''[T]his court will imply findings of fact and conclusions of law so long as the record is clear and will support the judgment.'').

B.

Next, Certified argues that absent an express contract, it should be able to recover under a theory of implied contract, either by quantum meruit or unjust enrichment.

[Headnote 10]

Certified confessedly is confused by quantum meruit and unjust enrichment, noting that ''the distinction between the two theories in Nevada is unclear.'' ''One source of confusion is that quantum meruit is a cause of action in two fields: restitution and contract.'' Candace Saari Kovacic-Fleischer, *Quantum Meruit and the Restatement (Third) of Restitution and Unjust Enrichment*, 27 Rev. Litig. 127, 129 (2007); Restatement (Third) of Restitution and Unjust Enrichment § 31 cmt. e (2011) (A pleading in quantum meruit, ''[f]rom its 17th-century origins to the present day, . . . has been used to state two quite different claims.''); *Martin v. Campanaro*, 156 F.2d 127, 130 n.5 (2d Cir. 1946) (addressing the ambiguity of a pleading in quantum meruit).

Quantum meruit historically was one of the common counts—a subspecies of the writ of indebitatus or general assumpsit—available as a remedy at law to enforce implied promises or contracts. 1 Joseph M. Perillo, *Corbin on Contracts* § 1.18(b), at 53 (rev. ed. 1993); 7 C.J.S. *Action of Assumpsit* § 2 (2004). A party who pleaded quantum meruit sought recovery of the reasonable value, or ''as much as he has deserved,'' *Black's Law Dictionary* 1361 (9th ed. 2009) (defining quantum meruit), for services rendered.

[Headnotes 11-15]

Thus, quantum meruit's first application is in actions based upon contracts implied-in-fact. A contract implied-in-fact must be ''manifested by conduct,'' *Smith v. Recrion Corp.*, 91 Nev. 666, 668, 541 P.2d 663, 664 (1975); *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984); it ''is a true contract that arises from the tacit agreement of the parties.'' Perillo, *supra*, § 1.20, at 64. To find a contract implied-in-fact, the fact-finder must conclude that

the parties intended to contract and promises were exchanged, the general obligations for which must be sufficiently clear. It is at that point that a party may invoke quantum meruit as a gap-filler to supply the absent term. *See* Kovacic-Fleischer, *supra*, at 129-30; 1 Dan B. Dobbs, *Dobbs Law of Remedies* § 4.2(3) (2d ed. 1993) (quantum meruit fills price term when it is appropriate to imply the parties agreed to a reasonable price). Where such a contract exists, then, quantum meruit ensures the laborer receives the reasonable value, usually market price, for his services. Restatement (Third) of Restitution and Unjust Enrichment § 31 cmt. e (2011); *see Sack v. Tomlin*, 110 Nev. 204, 208, 871 P.2d 298, 302 (1994) (''The doctrine of quantum meruit generally applies to an action . . . involving work and labor performed which is founded on a[n] oral promise [or other circumstances] on the part of the defendant to pay the plaintiff as much as the plaintiff reasonably deserves for his labor in the absence of an agreed upon amount.''); *see also Paffhausen v. Balano*, 708 A.2d 269, 271 (Me. 1998) (discussing quantum meruit as a contract implied-in-fact).

[Headnote 16]

Certified maintains that it had an implied contract with Precision for the design-related work. As discussed above, however, substantial evidence supports the district court's finding that there was no contract, express or implied, for the design work standing alone. There are simply too many gaps to fill in the asserted contract for quantum meruit to take hold. Precision never agreed to a contract for only design-related work, the parties never agreed to a price for that work, and they disputed the time of performance. When Precision selected Certified, it did so on the basis that Certified would design *and install* the fire suppression system, not that it would draft the designs and leave installation to someone else. The evidence established that design drawings are installer-specific and so not useful to a replacement subcontractor. Accordingly, the district court properly denied recovery in quantum meruit for an implied-in-fact contract.

[Headnotes 17, 18]

Quantum meruit's other role is in providing restitution for unjust enrichment: ''Liability in restitution for the market value of goods or services is the remedy traditionally known as quantum meruit.'' Restatement (Third) of Restitution and Unjust Enrichment § 49 cmt. f (2011); *id.* § 31 cmt. e (2011) (quantum meruit's secondary use is as a pleading in the common law in cases ''regarded in modern law as instances of unjust enrichment rather than contract''); *Ewing v. Sargent*, 87 Nev. 74, 79-80, 482 P.2d 819, 822-23 (1971) (discussing recovery in quantum meruit to prevent unjust enrichment). '' 'Where unjust enrichment is found, the law implies a quasi-contract which requires the defendant to pay to plaintiff

the value of the benefit conferred. In other words, the defendant makes restitution to the plaintiff in *quantum meruit*.' '' *Lackner v. Glosser*, 892 A.2d 21, 34 (Pa. Super. Ct. 2006) (quoting *AmeriPro Search, Inc. v. Fleming Steel Co.*, 787 A.2d 988, 991 (Pa. Super. Ct. 2001)).

[Headnotes 19-22]

When a plaintiff seeks ''as much as he . . . deserve[s]'' based on a theory of restitution (as opposed to implied-in-fact contract), he must establish each element of unjust enrichment. *Black's Law Dictionary* 1361 (9th ed. 2009); *see* Restatement (Third) of Restitution and Unjust Enrichment § 49(3)(c) & cmt. f (2011) (''[T]he market value of . . . services is the *remedy* traditionally known as quantum meruit.'' (emphasis added)); Doug Rendleman, *Quantum Meruit for the Subcontractor: Has Restitution Jumped Off Dawson's Dock?*, 79 Tex. L. Rev. 2055, 2073 (2001) (''A defendant's unjust enrichment is the major prerequisite for a plaintiff's quantum meruit.''). Quantum meruit, then, is ''the usual measurement of enrichment in cases where nonreturnable benefits have been furnished at the defendant's request, but where the parties made no enforceable agreement as to price.''[3] Restatement (Third) of Restitution and Unjust Enrichment § 49 cmt. f (2011).

[Headnotes 23, 24]

Unjust enrichment exists when the plaintiff confers a benefit on the defendant, the defendant appreciates such benefit, and there is '' 'acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof.' '' *Unionamerica Mtg. v. McDonald,* 97 Nev. 210, 212, 626 P.2d 1272, 1273 (1981) (quoting *Dass v. Epplen*, 424 P.2d 779, 780 (Colo. 1967)). Thus—contrary to Certified's argument—a pleading of quantum meruit for unjust enrichment does not discharge the plaintiff's obligation to demonstrate that the defendant received a benefit from services provided. Restatement (Third) of Restitution and Unjust Enrichment § 31 cmt. e (2011); 1 Dan B. Dobbs, *Dobbs Law of Remedies* § 4.2(3) (2d ed. 1993) (plaintiff pursuing quantum meruit under unjust enrichment theory must show benefit to defendant); 26 Richard A. Lord, *Williston on Contracts* § 68:1, at 24 (4th ed. 2003) (quantum meruit to avoid unjust enrichment applies ''when a party confers a benefit with a reasonable expectation of payment''); *EPIC v. Salt Lake County*, 167 P.3d 1080, 1086 (Utah

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[3]The actual value of recovery in such cases is ''usually the lesser of (i) market value and (ii) a price the defendant has expressed a willingness to pay.'' Restatement (Third) of Restitution and Unjust Enrichment § 31 cmt. e (2011). Of course, quantum meruit is not the only measure of damages available in restitution. *See id.* § 49 (enunciating measures of enrichment and circumstances when each applies).

2007) (first element of quantum meruit is showing a benefit has been conferred).

[Headnotes 25, 26]

''[B]enefit'' in the unjust enrichment context can include ''services beneficial to or at the request of the other,'' ''denotes any form of advantage,'' and is not confined to retention of money or property. *See* Restatement of Restitution § 1 cmt. b (1937); *see also Topaz Mutual Co. v. Marsh*, 108 Nev. 845, 856, 839 P.2d 606, 613 (1992) (citing § 1, cmt. b and noting that postponing foreclosure on a property benefits owner by providing additional time to negotiate a sale and reducing overall debt). But while ''[r]estitution may strip a wrongdoer of all profits gained in a transaction with [a] claimant . . . principles of unjust enrichment will not support the imposition of a liability that leaves an innocent recipient worse off . . . than if the transaction with the claimant had never taken place.'' Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. d (2011); *cf. Heartland Health Systems v. Chamberlin*, 871 S.W.2d 8, 11 (Mo. Ct. App. 1993) (quantum meruit available for provision of emergency medical services).

That is the state of our law, too. In *Thompson v. Herrmann*, 91 Nev. 63, 68, 530 P.2d 1183, 1186 (1975), this court concluded that ''[t]he basis of recovery on quantum meruit . . . is that a party has received from another a benefit which is unjust for him to retain without paying for it.'' In that case, the defendant was to build a dam for the plaintiffs but the defendant's preliminary work failed to meet state regulations and thus was rendered useless. *Id.* at 64-67, 530 P.2d at 1183-85. Because the plaintiffs were required to hire a new laborer to completely rebuild the dam to code, this court held that the defendant could not recover on his counterclaim under a theory of quantum meruit because he had provided no benefit to the plaintiffs, *i.e.*, while he began the work the plaintiffs requested, he ultimately provided no advantage to them. *Id.* at 68, 530 P.2d at 1186.

[Headnote 27]

Here, the district court found that Precision had not ''unjustly retain[ed] any money or property because no work performed could be utilized by the replacement fire sprinkler subcontractor,'' and that included the sprinkler designs. Every one of Certified's witnesses admitted as much on cross-examination. Thus, Certified's owner, Doug Sartain, testified that Certified installed nothing at the job site and its preparatory work could not be utilized by the replacement subcontractor. Gary Wooldridge, Certified's project manager, confirmed Sartain's statements that the design work and permitting performed by Certified could not be used by their replacement subcontractor (though he did say the water flow test could have been utilized). Finally, Ron Dusky, the man who

drafted the plans, stated in his deposition (which was read into the record) that the designs Certified submitted contained mistakes that would have required one to two weeks to remedy. This was never done. Certified submitted no evidence of an ascertainable advantage Precision drew from the work it performed. It was incomplete, incorrect, and late. Therefore, we agree with the district court that Certified cannot recover in quantum meruit or unjust enrichment.

III.

On cross-appeal, Precision argues that the district court abused its discretion by failing to award attorney fees based on the $7,501.00 offer of judgment it made shortly after filing its answer. Specifically, Precision argues that the court did not adequately address the factors established by *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983), in assessing motions for attorney fees under NRS 17.115 and NRCP 68. Precision also faults the district court for not granting fees pursuant to the mechanic's lien statute, NRS 108.237.

[Headnotes 28-30]

The district court did not abuse its discretion. It determined that the offer of judgment was ''unreasonable in amount'' and made so early in litigation that Certified had not yet had a fair opportunity to assess its claim through discovery. Although Precision argues otherwise, there is no bright-line rule that qualifies an offer of judgment as per se reasonable in amount; instead, the district court is vested with discretion to consider the adequacy of the offer and the propriety of granting attorney fees. *State Drywall v. Rhodes Design & Dev.*, 122 Nev. 111, 119 n.18, 127 P.3d 1082, 1088 n.18 (2006). Nor are explicit findings on every *Beattie* factor required for the district court to adequately exercise its discretion. *See id.*; *Wynn v. Smith*, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001) (''Although explicit findings with respect to these factors are preferred, the district court's failure to make explicit findings is not a per se abuse of discretion.'').

[Headnote 31]

Likewise, the district court did not abuse its discretion by denying Precision's request for attorney fees under the mechanic's lien statute. *See* NRS 108.237(3) (''If the lien claim is not upheld, the court *may* award costs and reasonable attorney's fees to the owner or other person defending against the lien claim if the court finds that the notice of lien was pursued by the lien claimant without a reasonable basis in law or fact.'' (emphasis added)); *Barney v. Mt. Rose Heating & Air*, 124 Nev. 821, 827, 192 P.3d 730, 734 (2008) (district court has discretion pursuant to NRS 108.237). While the district court did not make an express reasonable-basis finding, the

record fills the gaps, *Luciano*, 97 Nev. at 639, 637 P.2d at 1220 (this court may imply factual findings so long as they are clear from the record), and Certified had a reasonable basis, *Rodriguez v. Primadonna Company*, 125 Nev. 578, 588-89, 216 P.3d 793, 800-01 (2009) (party's claim may be reasonable despite losing), to pursue the lien.[4]

Accordingly, we affirm.

CHERRY, C.J., and GIBBONS, J., concur.

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ROAD AND HIGHWAY BUILDERS, LLC, A NEVADA LIMITED LIABILITY COMPANY, APPELLANT, *v.* NORTHERN NEVADA REBAR, INC., A NEVADA CORPORATION, RESPONDENT.

No. 55542

ROAD AND HIGHWAY BUILDERS, LLC, A NEVADA LIMITED LIABILITY COMPANY, APPELLANT, *v.* NORTHERN NEVADA REBAR, INC., A NEVADA CORPORATION, RESPONDENT.

No. 56499

August 9, 2012 284 P.3d 377

Consolidated appeals from a district court judgment on a jury verdict in a contract action and a post-judgment order denying a new trial motion. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

General contractor on highway construction project brought suit for breach of contract against subcontractor, and subcontractor asserted counterclaims including claims for fraud in the inducement, breach of contract, breach of implied covenant of good faith and fair dealing, and consumer fraud. Following a jury trial, the district court entered judgment for subcontractor that included award of punitive damages. General contractor appealed. The supreme court, CHERRY, C.J., held that: (1) subcontractor could not maintain fraud in the inducement claim against general contractor, (2) evidence supported jury's award of compensatory damages, and (3) subcontractor could not recover punitive damages.

**Affirmed in part and reversed in part.**

*Pisanelli Bice PLLC* and *Todd L. Bice* and *Jarrod L. Rickard*, Las Vegas; *Carl M. Hebert*, Reno, for Appellant.

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[4]Certified does not argue the district court's award of costs was improper. Therefore, we affirm that order.

*Holland & Hart LLP* and *Alex Flangas* and *Tamara Reid*, Reno; *Holland & Hart LLP* and *J. Lee Gray*, Greenwood Village, Colorado, for Respondent.

1. APPEAL AND ERROR.
   The supreme court reviews the district court's grant or denial of summary judgment de novo.
2. FRAUD.
   Subcontractor could not maintain fraud in the inducement claim against general contractor based on general contractor's alleged promise to subcontractor that subcontractor would provide all rebar necessary for highway construction project, where subcontract expressly provided that general contractor could order revisions to scope of subcontractor's work at any time and alleged fraud thus conflicted with express term of subcontract.
3. CONTRACTS.
   When interpreting a contract, the court must read the contract as a whole and avoid negating any contract provision.
4. APPEAL AND ERROR.
   The supreme court will affirm an award of compensatory damages unless the award is so excessive that it appears to have been given under the influence of passion or prejudice.
5. APPEAL AND ERROR.
   Unless it is determined from all the evidence presented that a jury's verdict is clearly wrong, the jury's compensatory damage award should be left undisturbed.
6. APPEAL AND ERROR.
   In reviewing whether the evidence supports a jury's compensatory damage award, all favorable inferences must be drawn in favor of the prevailing party.
7. DAMAGES.
   Evidence that subcontractor was owed $500,000 for labor and materials provided for highway construction project for general contractor and was owed $200,000 for earned profits for work already completed on project was sufficient to support jury's $700,000 award of compensatory damages in subcontractor's action against general contractor for breach of contract and breach of implied covenant of good faith and fair dealing.
8. DAMAGES.
   In contract cases, compensatory damages are awarded to make the aggrieved party whole and should place the plaintiff in the position the plaintiff would have been in had the contract not been breached.
9. DAMAGES.
   Compensatory damages recoverable in action for breach of contract include awards for lost profits or expectancy damages. Restatement (Second) of Contracts § 347.
10. DAMAGES.
    Subcontractor could not recover punitive damages in action against general contractor alleging breach of implied covenant of good faith and fair dealing with respect to subcontractor's agreement to supply rebar for highway construction project, where general contractor's alleged promise that subcontractor would provide all rebar for project was contrary to express terms of subcontract and thus did not involve special element of re-

liance or fiduciary duty necessary that would support award of punitive damages.

11. APPEAL AND ERROR; EVIDENCE.
Whether expert testimony will be admitted, as well as whether a witness is qualified to be an expert, is within the district court's discretion, and the supreme court will not disturb that decision absent a clear abuse of discretion.

12. NEW TRIAL.
If a challenged issue would not have changed the outcome of the case, there is no violation of the party's substantial rights and thus no basis for granting a new trial.

Before CHERRY, C.J., GIBBONS and PICKERING, JJ.

## OPINION

By the Court, CHERRY, C.J.:

These consolidated appeals address whether a claim for fraud in the inducement is available when the basis for the claim contradicts the very language of the contract at issue in the parties' dispute. We conclude that when a fraudulent inducement claim contradicts the express terms of the parties' integrated contract, it fails as a matter of law. Additionally, we address the propriety of the damages awarded by the jury under a separate claim for breach of contract. We affirm the compensatory damages award but reverse the punitive damages award, as we reverse the finding of fraud on which the punitive damages were based.

### *FACTS*

Appellant Road and Highway Builders, LLC (Builders), a general contractor, was awarded a contract with the Nevada Department of Transportation (NDOT) to build a 2.3-mile portion of the Carson City Freeway project (the Project), from U.S. Highway 50 to Fairview Drive. The Project required a substantial amount of reinforcing steel, or rebar, including an amount to be used in the installation of more than 3,000 lineal feet of reinforced concrete boxes (RCBs) under the roadway surface in order to drain water.

For the rebar subcontractor work, Builders chose respondent Northern Nevada Rebar, Inc. (NNR), based on NNR's pre-award bid to Builders. According to NNR, its bid, including the unit price for the rebar, was based upon providing all of the rebar needed pursuant to NDOT's plans and engineering estimates, which called for approximately 2.7 million pounds of black and epoxy-coated rebar and for manufacturing the RCBs by pouring the concrete in place at the job site. Even before incorporating NNR's bid into its bid to NDOT, however, Builders was considering using precast RCBs instead of poured-in-place RCBs and had begun the

requisite change approval process through NDOT. Builders decided that, if approval was granted, it would use a different subcontractor, Rinker Materials, to supply the substituted precast RCBs. However, Builders never communicated these plans to NNR, and Builders used NNR's subcontract bid in making its bid on the Project to NDOT.

After being awarded the contract but while waiting for NDOT's approval to use the precast RCBs, Builders began drafting a subcontract with NNR for all of the rebar work on the Project. Builders then, before obtaining approval from NDOT, submitted a purchase order to Rinker for the precast RCBs for the Project. A few weeks later, Builders delivered the written subcontract agreement to NNR. At this point, Builders had not disclosed to NNR that it was attempting to use precast RCBs from another supplier. Thus, Builders contemplated making deductions to the quantities of rebar that NNR would furnish and install under the draft subcontract. The day after Builders delivered the subcontract to NNR, NDOT gave approval for the substitution of approximately 80 percent of the poured-in-place RCBs. Builders did not update the subcontract or otherwise disclose this information to NNR.

Builders and NNR subsequently negotiated and agreed to a finalized subcontract (the Subcontract) for the Project's rebar work. The Subcontract provided that NNR would furnish all labor and materials necessary to fully perform and complete the work, which consisted of the full 2.7 million pounds of rebar, including the RCBs. The Subcontract also specified, however, that ''[w]ithout invalidating this Subcontract[,] . . . [Builders] may, at any time or from time to time, order additions, deletions or revisions in the Work to be performed by [NNR].'' And similarly, the Subcontract also stated, ''[i]n addition to changes made or additional Work ordered by [NDOT] under the Contract, [Builders] reserves the right to make any change, including additions of omissions, in the Work to be performed by [NNR] under this Subcontract.'' The Subcontract set the nonmodifiable unit price of the rebar while at the same time recognizing that the final quantities of rebar would match NDOT's quantities unless otherwise agreed to in writing. Builders was granted the absolute right to terminate at any time and for any reason, and the parties expressly agreed that, in the event of such a termination, NNR's sole remedy would be payment for the work that it had performed up to the termination date. So as to preclude any oral understandings contrary to the Subcontract's written terms, the parties agreed that the written agreement was their only agreement.

After the Subcontract was executed, NNR began delivering and installing rebar on the Project. However, many of the precast RCBs had already been installed by Rinker. When NNR first learned of Builders' use of precast RCBs, it sought an equitable adjustment of

the unit price for the rebar pursuant to the Subcontract. Builders rejected the request, stating that it had a right to make the changes. In response, NNR sought payment for the work provided to date and demanded to be released from the Subcontract; nonetheless, NNR continued to work on the Project. Subsequently, Builders sent a letter to NNR stating that it had ceased all payments to NNR until the matter was resolved. NNR continued to work and responded to the cease-payment letter by requesting payment and withdrawing the demand to be released from the Subcontract.

Several weeks later, NNR's employees did not show up on the job site because, according to NNR, it was completely out of work while it was waiting for Builders to move dirt. The same day that NNR's employees did not show up, Builders sent a letter to NNR stating that NNR was in default for not showing up and informing NNR that it would be replaced immediately. After receiving the termination letter, NNR's employees indicated that they would not be returning. By that time, NNR had supplied 28 percent of the total black rebar and 6 percent of the total epoxy-coated rebar for the Project.

Builders filed suit against NNR the next day, alleging a claim for breach of contract. NNR answered and asserted several counterclaims against Builders, including fraud in the inducement, breach of contract, breach of the implied covenant of good faith and fair dealing, and consumer fraud. Builders replaced NNR with a new subcontractor, causing a 16-day delay and requiring Builders to pay $152,198 more than NNR's total bid price for the rebar on the Project, in addition to other delay damages.

After a failed attempt by Builders to remove NNR's fraudulent inducement counterclaim via summary judgment, the parties proceeded to trial. Following NNR's case-in-chief, Builders moved for judgment as a matter of law under NRCP 50(a), on the sole basis that NNR had failed to make a prima facie case for fraudulent inducement, but the district court denied the motion.

Following the four-day trial, the jury unanimously found against Builders on its claim and found in favor of NNR on its counterclaims. The jury awarded NNR $700,000 in compensatory damages. Because the jury found that there had been fraudulent conduct, the jury returned for further deliberation on punitive damages. The jury assessed $300,000 in punitive damages against Builders.

After judgment was entered on the jury verdict, Builders renewed its motion for judgment as a matter of law and sought a new trial; the district court denied Builders' motion. Builders appealed, arguing among other things that the district court erred in allowing NNR's fraud claims to proceed to trial when the basis for the fraud claims contradicts the very language of the Subcontract and that the defects in the fraud claims leave the damages awards unsupported.

*DISCUSSION*

We first address whether the counterclaim for fraud in the inducement could proceed in this case when the basis for the claim contradicts the terms of the contract at issue in the parties' dispute. We then move on to address the propriety of the damages awards.

*Standard of review*

[Headnote 1]

Builders argues that it was entitled to summary judgment or judgment as a matter of law on NNR's counterclaim for fraud in the inducement. We review such rulings de novo. *Winchell v. Schiff*, 124 Nev. 938, 947, 193 P.3d 946, 952 (2008) (reviewing a district court's order granting or denying judgment as a matter of law de novo); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (reviewing granting or denying of summary judgment de novo).

*Fraudulent inducement*

Builders contends that the district court erred as a matter of law in allowing NNR's fraudulent inducement counterclaim to proceed, as the law precludes assertions of fraud when the alleged misrepresentation is contradicted by the parties' bargained-for terms.[1] *See, e.g.*, *Tallman v. First Nat. Bank*, 66 Nev. 248, 259, 208 P.2d 302, 307 (1949) (stating that ''fraud is not established by showing parol agreements at variance with a written instrument and there is no inference of a fraudulent intent not to perform from the mere fact that a promise made is subsequently not performed''); *Brinderson-Newberg v. Pacific Erectors*, 971 F.2d 272, 278 (9th Cir. 1992) (explaining that completely integrated contracts negate any oral agreements that provide for contrary interpretations of the contract terms). In particular, Builders argues that NNR cannot rest upon a purported promise concerning the amount of rebar NNR would provide for the Project, when that representation is at odds with the parties' agreed-upon contractual terms allowing Builders to reduce the quantity of rebar, stating that the unit price of the rebar was unaffected by quantity, and providing that the contract was terminable at will.

NNR contends that the facts presented at trial amply support the jury's finding that Builders committed fraud, insofar as Builders induced NNR to enter into a contract to provide all the rebar neces-

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[1]NNR argues that Builders waived this argument and the argument that NNR is not entitled to punitive damages. However, because Builders raised these issues in the district court through a motion for summary judgment and in its request for judgment under NRCP 50(a), they are properly raised on appeal.

sary for the Project, without disclosing to NNR that it had no intention of performing its contractual obligations and had already ordered a substantial amount of the contracted rebar from another supplier. NNR argues that it was induced into entering into the contract and that it was induced into offering a lower unit price because of the large amount of rebar needed for the Project.

[Headnotes 2, 3]

Reading the Subcontract as a whole and avoiding negating any contract provision, as we must, *see National Union Fire Ins. v. Reno's Exec. Air*, 100 Nev. 360, 364, 682 P.2d 1380, 1383 (1984); *Philips v. Mercer*, 94 Nev. 279, 282, 579 P.2d 174, 176 (1978), results in the reasonable interpretation that the parties contemplated a potential alteration in the scope of NNR's work. As explained by this court in *Tallman*, the purported inducement cannot be something that conflicts with the Subcontract's express terms, as the terms of the contract are the embodiment of *all* oral negotiations and stipulations. 66 Nev. at 257, 208 P.2d at 306. '' 'When the plaintiff pleads that the writing . . . does not express the intentions of the parties to it at the time, he pleads something which the law will not permit him to prove.' '' *Id.* (quoting *Natrona Power Co. v. Clark*, 225 P. 586, 589 (Wyo. 1924)); *see also Green v. Del-Camp Investment, Inc.*, 14 Cal. Rptr. 420, 422 (Ct. App. 1961) (stating that where ''the claim[e]d fraud consists of a false promise with respect to a matter covered by the agreement itself, the oral evidence would contradict the terms of the agreement, in direct contravention of the rules. Such proof is not permitted.''); *Sherrodd, Inc. v. Morrison-Knudsen Co.*, 815 P.2d 1135, 1137 (Mont. 1991) (providing that the exception made to the parol evidence rule when fraud is alleged ''only applies when the alleged fraud does not relate directly to the subject of the contract. Where an alleged oral promise directly contradicts the terms of an express written contract, the parol evidence rule applies.'').

The Subcontract specified that Builders could, at any time, order additions, deletions, omissions, or revisions to NNR's work. While the Subcontract specified that the final quantities of rebar would match NDOT's quantities unless otherwise agreed to in writing, the Subcontract also allowed for Builders to order revisions to NNR's work, regardless of any changes to the rebar work provided under the NDOT contract. Moreover, the Subcontract provided that the total price would be subject to additions and deductions for changes in the work and other adjustments, but that the unit prices were set to remain in force regardless of quantity. Therefore, while Builders might have breached the contract by unilaterally making alterations to the scope of work without an agreement in writing, this cannot form a basis for fraud under these cir-

cumstances. The parties contemplated a potential alteration in the scope of work, which NNR impliedly admits in its answering brief when it affirmatively quotes from the contract provision that ''[f]inal quantities may vary and will match [NDOT's] quantities to [Builders] unless otherwise agreed to in writing'' in support of its argument. Based on this, NNR's fraudulent inducement claim directly contradicts the terms of the contract, at least one of which NNR itself admits is an accurate representation of the parties' bargain. While Builders may have acted improperly by failing to obtain a written agreement before making changes in the scope of work, this amounts to a breach of contract, not a fraud. In light of the foregoing, we conclude that NNR's fraudulent inducement claim fails as a matter of law.[2]

*Compensatory damages*

Builders argues that the jury's verdict indisputably rests only upon the defective fraudulent inducement claim because no other claim could sustain the jury's $700,000 compensatory damages verdict. Builders contends that under the contract, NNR would only be able to receive the actual cost of work completed, not for lost profits. However, we conclude that both NNR's breach of contract claim and its breach of the implied covenant of good faith and fair dealing claim fully support the award.

[Headnotes 4-6]

''We will affirm an award of compensatory damages unless the award is so excessive that it appears to have been given under the influence of passion or prejudice.'' *Bongiovi v. Sullivan*, 122 Nev. 556, 577, 138 P.3d 433, 448 (2006). Unless it is determined from all the evidence presented that a jury's verdict is clearly wrong, the jury's compensatory damage award should be left undisturbed. *Ringle v. Bruton*, 120 Nev. 82, 91, 86 P.3d 1032, 1038 (2004). In reviewing whether the evidence supports the jury's compensatory damage award, all favorable inferences must be drawn in favor of the prevailing party. *See Grosjean v. Imperial Palace*, 125 Nev. 349, 366, 212 P.3d 1068, 1080 (2009).

[Headnote 7]

NNR provided testimony that it was owed $500,000 for labor and materials that it provided but for which Builders did not pay and a little over $200,000 for earned profits for work already

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[2]The parties in this case failed to raise the argument that the risk of this type of problem was allocated in the contract; since the matter is incorporated into and not collateral to the contract terms themselves, breach of contract claims should prevail over tort claims. Because this argument was not raised, it will not be discussed further.

completed.[3] The jury unanimously found in favor of NNR on its counterclaims and awarded NNR $700,000 in compensatory damages. Thus, the jury's award corresponded with NNR's testimony regarding what NNR claimed it was owed for labor, material, and lost profits for completed work.

[Headnotes 8, 9]

In light of the broad test enunciating that an award for damages will only be reduced or overturned if the award is clearly wrong, we conclude that the award of compensatory damages in this case is properly supported by the breach of contract claim or the breach of the implied covenant of good faith and fair dealing claim. *See Hilton Hotels v. Butch Lewis Productions*, 109 Nev. 1043, 1046, 862 P.2d 1207, 1209 (1993) (stating that the duty of good faith and fair dealing is always imposed on the contracting parties and becomes a part of the contract such that the remedy for the duty's breach is based on the contract). It is well established that in contracts cases, compensatory damages ''are awarded to make the aggrieved party whole and . . . should place the plaintiff in the position he would have been in had the contract not been breached.'' *Hornwood v. Smith's Food King No. 1*, 107 Nev. 80, 84, 807 P.2d 208, 211 (1991). This includes awards for lost profits or expectancy damages. *Colorado Environments v. Valley Grading*, 105 Nev. 464, 470-71, 779 P.2d 80, 84 (1989) (adopting the test espoused in Restatement (Second) of Contracts § 347 (1979)).

The Restatement (Second) of Contracts § 347 (1981) sets forth the proper method for determining lost profit or expectancy damages. It provides that:

> [s]ubject to the limitations stated in §§ 350-53, the injured party has a right to damages based on his expectation interest as measured by
>
> (a) the loss in value to him of the other party's performance caused by its failure or deficiency, plus
>
> (b) any other loss, including incidental or consequential loss, caused by the breach, less
>
> (c) any cost or other loss that he has avoided by not having to perform.

Pursuant to our caselaw and the aforementioned Restatement (Second) test, it was proper for the jury to award compensation to NNR under the breach of contract or the breach of the implied covenant of good faith and fair dealing claims for both its costs and for lost profits. The evidence supported that Builders' refusal to pay resulted in NNR losing the benefit of the bargain, *i.e.*, lost

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[3]We reject Builders' argument that provision 15.2.1 of the Subcontract prevents recovery of lost profits on the work already performed under the contract.

profits, and the unpaid labor and material costs it provided on the job.

However, Builders asserts that NNR's claims for breach of contract and breach of the contractual duty of good faith and fair dealing cannot sustain such a verdict because the contract was terminable at Builders' convenience. Builders cites to *Dalton Properties, Inc. v. Jones*, 100 Nev. 422, 424, 683 P.2d 30, 31 (1984), for the proposition that when the contract is terminable at will, the terminated party cannot recover lost profits. We conclude that Builders' reliance on *Dalton* is misplaced because it deals with an award for unearned profits, 100 Nev. at 424, 683 P.2d at 31, while NNR's award was for lost profits on work already completed. In the instant matter, we conclude that because the jury could only have awarded $200,000 in lost profits, as NNR was owed $500,000 for labor and materials and was awarded $700,000, and as those lost profits were not future lost profits but were for work that was already completed, this does not run afoul of *Dalton* or the Restatement test. *See* Restatement (Second) of Contracts § 347 (indicating that damages should be reduced by any cost or other loss that has been avoided by no longer being required to perform).

*Punitive damages*

[Headnotes 10-12]

Because we conclude that the fraudulent inducement claim fails as a matter of law, we further conclude that the award for punitive damages cannot stand. *Amoroso Const. v. Lazovich and Lazovich*, 107 Nev. 294, 298, 810 P.2d 775, 777-78 (1991) (explaining that punitive damages are not permissible for breach of contract claims (citing *Sprouse v. Wentz*, 105 Nev. 597, 781 P.2d 1136 (1989))). This award for punitive damages cannot be supported by the breach of the implied covenant of good faith and fair dealing as that claim sounds in contract, and not tort, in this instance. *See Hilton Hotels v. Butch Lewis Productions*, 109 Nev. 1043, 1046-47, 862 P.2d 1207, 1209 (1993) (concluding that while ''[i]n certain circumstances, breach of contract, including breach of the covenant of good faith and fair dealing, may provide the basis for a tort claim,'' there is a special element of reliance or fiduciary duty that is required for the claim to sound in tort (quotation omitted)). As there was no special element of reliance or fiduciary duty here for the implied covenant claim to be based in tort, punitive damages cannot stand. Accordingly, we reverse the district court's award of punitive damages.[4]

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[4]Builders also argues that the district court abused its discretion in sua sponte excluding the testimony of an expert witness. NNR asserts that Builders waived this argument by failing to object to the district court's ruling to exclude

For the foregoing reasons, we affirm the district court's judgment as to compensatory damages and we reverse the district court's judgment as to punitive damages.[5]

GIBBONS and PICKERING, JJ., concur.

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FRANCIE A. BONNELL, APPELLANT, *v.* SABRINA D. LAWRENCE AND STEVEN LAWRENCE, RESPONDENTS.

No. 56542

August 9, 2012 282 P.3d 712

Appeal from a district court order dismissing a complaint seeking relief from a judgment by independent action pursuant to NRCP 60(b)'s savings clause. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Mother filed independent action seeking relief from summary judgment entered against her in prior suit against daughter and son-in-law on mother's claim that she was orally granted life estate in daughter's real property in exchange for mother's payment of $135,000 to retire mortgage debt on property. The district court granted defendants' motion to dismiss with prejudice for failure to state claim and on res judicata grounds, and mother appealed. The supreme court, PICKERING, J., held that: (1) dismissal of mother's independent action as matter of law was subject to de novo review; (2) mother's allegations did not demonstrate that independent action was necessary to prevent grave miscarriage of justice; and (3) to extent that partial performance of oral agreement to grant mother life estate in real property was defense to statute of frauds,

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the testimony. However, Builders raised this issue in its renewed motion for judgment as a matter of law or for a new trial, and the district court ruled on the issue, and thus, we address Builders' argument.

'' 'Whether expert testimony will be admitted, as well as whether a witness is qualified to be an expert, is within the district court's discretion, and [we] will not disturb that decision absent a clear abuse of discretion.' '' *Matter of Mosley*, 120 Nev. 908, 921, 102 P.3d 555, 564 (2004) (quoting *Mulder v. State*, 116 Nev. 1, 12-13, 992 P.2d 845, 852 (2000)). If the challenged issue would not have changed the outcome of the case, there is no violation of the party's substantial rights and thus no basis for granting a new trial. *Edwards Indus. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1037, 923 P.2d 569, 576 (1996). We conclude that the district court did not abuse its discretion in the exclusion of the expert testimony as Builders makes no showing that the exclusion of the expert's proffered testimony would have in any way altered the outcome of any of NNR's claims.

[5]All other arguments raised by the parties are rendered moot by the disposition of this appeal.

mother's remedy from entry of summary judgment against her was motion for new trial or appeal.

**Affirmed.**

*Kemp, Jones & Coulthard, LLP*, and *Carol L. Harris* and *J. Randall Jones*, Las Vegas, for Appellant.

*Howard & Howard Attorneys PLLC* and *James A. Kohl*, Las Vegas, for Respondents.

1. JUDGMENT.
   Relief from judgment may be sought by motion or by independent action. NRCP 60(b).
2. JUDGMENT.
   To obtain relief from an otherwise unreviewable final judgment by independent action, a claimant must meet the traditional requirements of such an equitable action, which are considerably more exacting than required for relief by motion for relief from judgment. NRCP 60(b).
3. JUDGMENT.
   Under the rule governing relief from judgment, an independent action is available only to prevent a grave miscarriage of justice. NRCP 60(b).
4. APPEAL AND ERROR.
   Dismissal of mother's independent action for relief from final, otherwise unreviewable, summary judgment as matter of law, which action was brought before different district court that did not preside over original action that resulted in summary judgment, was subject to de novo review. NRCP 60(b).
5. APPEAL AND ERROR.
   On appeal from the grant of a motion to dismiss, the supreme court will review the order under the standards applicable to a motion for summary judgment when the district court considered matters outside the pleadings.
6. JUDGMENT.
   The policy supporting the finality of judgments recognizes that, in most instances, society is best served by putting an end to litigation after a case has been tried and judgment entered.
7. JUDGMENT.
   The bar against relitigation of already-decided issues is, in essence, an entitlement not to stand trial or face the other burdens of litigation, and it should be resolved at the earliest possible stage in litigation.
8. JUDGMENT.
   Summary judgment is appropriate when claim or issue preclusion bars a claim.
9. JUDGMENT.
   Mother's allegations that daughter and son-in-law unfairly exploited her pro se status in litigation on mother's claim that she was orally granted life estate in real property in exchange for payment of $135,000 to pay off mortgage on property, and that daughter and son-in-law gave her faulty notice of hearing on their motion for summary judgment, which prevented mother from orally opposing motion, did not demonstrate that independent action for relief of final, otherwise unreviewable, summary judgment was necessary to prevent grave miscarriage of justice; mother had legal remedies that she neglected, in that she knew about

judgment and could have, but failed, to file timely post-judgment motions or appeal, she did not allege that misconduct by defendants, personal incapacity, or other extenuating circumstance excused her failure to act after summary judgment was entered, and she alleged nothing suggesting that summary judgment worked grave miscarriage of justice. NRCP 59, 60(b)(1), (3); NRAP 4(a)(1).

10. JUDGMENT.

Fundamental rules governing the finality of judgments cannot be applied differently merely because a party not learned in the law is acting pro se.

11. JUDGMENT.

To extent that partial performance of oral agreement to grant mother life estate in real property was defense to statute of frauds, in mother's action against daughter and son-in-law, mother's remedy from entry of summary judgment against her was motion for new trial or appeal, not an independent action for relief from final judgment. NRCP 59, 60(b).

Before CHERRY, C.J., PICKERING and HARDESTY, JJ.

## OPINION

By the Court, PICKERING, J.:

This is an appeal from an order dismissing an independent action to obtain relief from an otherwise unreviewable final judgment. Such an action will lie only when needed to prevent a grave miscarriage of justice. Because the allegations and record in this case do not meet this demanding standard, we affirm.

### I.

This is the second of two lawsuits brought by appellant Francie Bonnell against her daughter and son-in-law, respondents Sabrina and Steven Lawrence. The first suit ended in summary judgment against Bonnell. The second suit underlies this appeal. In it, Bonnell seeks to undo the summary judgment in the first suit, along with its associated fee award.

This family stand-off traces back to a $135,000 payment that Bonnell made to retire the mortgage debt on her daughter's home (sometimes called ''the Lindell premises''). Bonnell saw the payment as an advance on what her daughter would eventually inherit anyway, but with a catch: She expected, in return, a life estate in the Lindell premises, allowing her to live in the home, rent-free, for the rest of her life. The daughter acknowledges the $135,000 payment. However, she viewed it as a loan—which she and her husband repaid when they deeded Bonnell a different home (the Arbor premises) with equity of $135,000+. No writing memorializes the agreement, if indeed there was one.

In her first suit, Bonnell asserted a variety of legal and equitable claims, all premised on her claimed life estate in the Lindell premises. After 14 months of litigation, Bonnell's lawyer withdrew, leaving her to proceed in proper person. Not long after, the Lawrences, who have had counsel throughout, moved for summary judgment. Their motion was supported by, among other documents, Sabrina Lawrence's affidavit. The affidavit lays out the parties' competing views of the $135,000 payment (Bonnell alleges ''she has an unwritten life estate in the [Lindell] premises'' that she ''claims she received . . . in exchange for $135,000 that she gave Sabrina to pay off an existing mortgage on the Lindell premises''; the Lawrences maintain that the $135,000 was a ''loan'' they ''repaid . . . when [Bonnell] received a $135,000 credit on the purchase of the Arbor Premises.''). It also discloses that, for a time, Bonnell lived rent-free in the Lindell premises.

Bonnell received the motion for summary judgment, but she did not file a written opposition to it, and it was granted by written order. In the order, the district judge determined that Bonnell's claims were ''meritless'' because they were based on a fully repaid loan; he further held that the statute of frauds, NRS 111.205, defeated Bonnell's oral life estate claim. Additional motion practice followed, in which Bonnell represented herself, whereby the Lawrences recovered their attorney fees and costs. Bonnell received written notice of entry of the summary judgment and fee award. She neither moved for reconsideration under NRCP 59 or relief from judgment under NRCP 60(b), nor appealed.

More than a year later, Bonnell obtained new counsel, who filed this second suit on her behalf. Although filed in the same judicial district and repeating the claims in the first suit, the second suit went to a new district court judge. Attaching excerpts from the summary judgment record in the first suit as exhibits, the second-suit complaint acknowledges that the prior summary judgment ordinarily would preclude Bonnell from suing again on the same claims. Nonetheless, Bonnell alleges that she can proceed by ''independent action pursuant to Rule 60(b)'' to vacate the prior judgment because the Lawrences obtained it when she was between lawyers and unfairly exploited her unrepresented status. Specifically, Bonnell alleges that the Lawrences gave her faulty notice of the summary judgment hearing, which prevented her from orally opposing the motion. She further alleges, ''A meritorious defense [*i.e.*, the doctrine of 'partial performance'] exists to [the Lawrences'] argument that NRS 111.205 defeats [Bonnell's] claim to a life estate in the Lindell Property, and the interests of justice demand that this issue be litigated on the merits.''

The Lawrences moved to dismiss the second suit for failure to state a claim under NRCP 12(b)(5). They argued that res judicata[1] bars relitigation of Bonnell's claims and that, to the extent Bonnell identified grounds for avoiding the prior summary judgment, she could and should have asserted them by motion under NRCP 60(b)(1)-(3) within the six-month deadline specified in the rule. Bonnell countered that ''misrepresentation [and/]or other misconduct of the adverse party'' can serve as the basis for either a motion or an independent action for relief from judgment and that, since an independent action is not subject to NRCP 60(b)'s time limits on motions, she deserves to proceed past the pleadings.

The district court credited the Lawrences' arguments, rejected Bonnell's, and dismissed the second suit with prejudice. Bonnell timely appeals.

## II.

[Headnote 1]

Some background is helpful to place the issues presented by this appeal in context. Rule 60(b) of the Nevada Rules of Civil Procedure is modeled on Rule 60(b) of the Federal Rules of Civil Procedure, as written before the latter's amendment in 2007. *See NC-DSH, Inc. v. Garner*, 125 Nev. 647, 650-51 nn.1 & 2, 218 P.3d 853, 856 nn.1 & 2 (2009). Like its federal counterpart, NRCP 60(b) permits relief from judgment by motion or by independent action. Addressing *motions*, the rule specifies both the permissible grounds, *see* NRCP 60(b)(1)-(5),[2] and the time deadlines that apply, *see* NRCP 60(b) (a motion under Rule 60(b) ''shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than 6 months after . . . written notice of entry of the judgment or order was served''). The rule's reference to relief by *independent action*, by contrast, provides no

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[1]In *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1051-56, 194 P.3d 709, 711-14 (2008), we replaced res judicata terminology with claim and issue preclusion. Addressing affirmative defenses, NRCP 8(c) retains res judicata terminology, which the parties used in briefing this matter.

[2]NRCP 60(b) provides as grounds for relief by motion: ''(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; or, (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that an injunction should have prospective application.'' These track the grounds for relief by motion under Fed. R. Civ. P. 60(b), except that Nevada omits the ''catchall'' provision in Fed. R. Civ. P. 60(b)(6), which allows ''any other reason that justifies relief'' as a basis for a Federal Rule 60(b) motion. Nevada also shortens the time limit for bringing a motion for reasons (1) through (3) from one year to six months.

specifics. It appears in a ''savings clause,'' which states only: ''This rule [*i.e.*, NRCP 60(b)] does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court.''

Bonnell bases her independent action on ''misrepresentation or other misconduct of an adverse party''—recognized grounds for relief from judgment by motion under NRCP 60(b)(3).[3] However, despite knowing about the judgment, Bonnell did not timely pursue motion-based relief under NRCP 60(b)(3). Because NRCP 60(b)'s text makes its time deadlines applicable only to motions, not independent actions, *see Nevada Industrial Dev. v. Benedetti*, 103 Nev. 360, 365, 741 P.2d 802, 805 (1987) (''[t]he only time limitations on independent actions under Rule 60(b) are laches or a relevant state of limitations''), Bonnell argues that she can proceed by independent action to set aside the summary judgment and associated fee award, despite her delay. In essence, Bonnell argues that a litigant who seeks relief from a final judgment but lets the time for doing so by motion under NRCP 60(b)(1)-(3) expire, can do so by independent action, so long as she alleges facts that might qualify for motion-based relief under NRCP 60(b)(1)-(3).

[Headnotes 2, 3]

But this is not the law. ''Resort to an independent action may be had only rarely, and then only under unusual and exceptional circumstances.'' 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2868, at 397-98 (2d ed. 1995). To obtain relief by independent action after a judgment has become final and otherwise unreviewable, a claimant must meet the traditional requirements of such an equitable action, which are considerably more exacting than required for relief by motion under NRCP 60(b)(1)-(3).[4] Furthermore, ''under the Rule,

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[3]Bonnell argues on appeal that the facts might also support relief based on mistake. We do not address this argument because it was not made to the district court. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

[4]The classic formulation of the pre-Civil Rules requirements for an action in equity seeking relief from judgment appears in *National Surety Co. v. State Bank*, 120 F. 593, 599 (8th Cir. 1903), *quoted in* 11 Wright, Miller & Kane, *supra*, § 2868, at 397:

> The indispensable elements of such a cause of action are (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the [party seeking to undo] the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of [said party]; and (5) the absence of any adequate remedy at law.

Nevada's pre-Civil Rules formulation is similar. *See, e.g.*, *Royce v. Hampton*, 16 Nev. 25, 30 (1881) (''To entitle a party to relief from a judgment or de-

an independent action [is] available only to prevent a grave miscarriage of justice.'' *United States v. Beggerly*, 524 U.S. 38, 47 (1998). This is a ''demanding standard,'' *id.*, that Bonnell's allegations of overreaching and legal error do not nearly approach.

A.

[Headnotes 4, 5]

We review the district court's order of dismissal under the standards applicable to a motion for summary judgment, because the Lawrences' motion to dismiss, like Bonnell's complaint, attached excerpts from the first-suit record that the district court considered without objection. *See Witherow v. State, Bd. of Parole Comm'rs*, 123 Nev. 305, 308, 167 P.3d 408, 409 (2007) (when the district court considers outside matters in deciding a motion to dismiss, this court reviews the disposition ''as if it [had] granted summary judgment''). The question remains, though, whether our review is de novo, as Bonnell argues it should be, *see id.* at 307-08, 167 P.3d at 409, or deferential, utilizing the ''abuse of discretion'' standard that applies to an appeal from an order granting or denying a motion for relief from judgment under NRCP 60(b), *see NC-DSH*, 125 Nev. at 657 n.4, 218 P.3d at 860 n.4, as the Lawrences maintain.

This is not a case in which the aggrieved party returned to the same judge who entered judgment to ask for relief from it. *See Superior Seafoods, Inc. v. Tyson Foods, Inc.*, 620 F.3d 873, 879 (8th Cir. 2010) (''Application of the abuse-of-discretion standard is particularly appropriate'' when the same judge presided over the original and succeeding independent action; this judge ''not only had a front-row seat for, and personal involvement in, the underlying matter'' that produced the targeted judgment, ''but he expressly drew upon his personal knowledge and stated in his ruling [on summary judgment in the independent action] that he was not defrauded by any of the alleged instances of malfeasance.''). Nor is this a case in which the district court decided the equitable claim for relief from judgment on the merits after a plenary hearing. *Cf. Mitchell v. Rees*, 651 F.3d 593, 595 (6th Cir. 2011) (because an independent action for relief from judgment ''is an equitable action, we would ordinarily review the district court's decision for an

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cree, it must be made evident that he had a defense upon the merits; and that such defense has been lost to him, without such loss being attributable to his own omission, neglect, or default. The loss of a defense, to justify a court of equity in removing a judgment, must, in all cases, be occasioned by the fraud or act of the prevailing party, or by mistake or accident on the part of the losing party, unmixed with any fault of himself or his agent.' '' (quoting *Freeman on Judgments* § 486)).

abuse of discretion''; nonetheless deciding, as a question of law, whether the allegations in the independent action were sufficient, under *Beggerly*'s ''demanding standard'' of a ''grave miscarriage of justice,'' 524 U.S. at 47, for the action to proceed). On the contrary, Bonnell brought this suit as an independent action, before a new district court judge, who determined its viability as a matter of law, on a motion to dismiss or for summary judgment. In this setting, ''*de novo* review clearly applies.'' *Herring v. United States*, 424 F.3d 384, 390 (3d Cir. 2005).

[Headnotes 6-8]

Of note, applying review appropriate to summary judgment does not lessen the ''demanding'' substantive law that applies to independent actions seeking review from judgment. *Id.* The policy supporting the finality of judgments recognizes that, '' 'in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered.' '' *NC-DSH*, 125 Nev. at 653, 218 P.3d at 858 (quoting *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238, 244 (1944), *abrogated on other grounds by Standard Oil Co. of Cal. v. United States*, 429 U.S. 17 (1976)). Similar to a qualified immunity or other privilege defense, the bar against relitigation of already-decided issues is, in essence, ''an entitlement not to stand trial or face the other burdens of litigation'' and ''should be resolved at the earliest possible stage in litigation.'' *Butler v. Bayer*, 123 Nev. 450, 458, 168 P.3d 1055, 1061 (2007) (internal quotations omitted). ''Summary judgment is appropriate when [claim or] issue preclusion bars a claim.'' *Elyousef v. O'Reilly & Ferrario, LLC*, 126 Nev. 441, 443, 245 P.3d 547, 548 (2010).

B.

The Supreme Court comprehensively reviewed Rule 60(b) in its 1998 decision in *United States v. Beggerly*, focusing, in particular, on the independent action for relief from judgment preserved by its ''savings clause.'' As *Beggerly* notes, the 1946 amendments to Federal Rule 60(b) expressly abolished ''nearly all of the old forms of obtaining relief from a judgment, *i.e.*, *coram nobis*, *coram vobis*, *audita querela*, bills of review, and bills in the nature of review''; only ''one of the old forms, *i.e.*, the 'independent action,' still survived.'' 524 U.S. at 45 (footnote omitted). Because it was preserved by ''savings clause,'' not created by grant, Rule 60(b) did not specify the requirements for a viable independent action. The Advisory Committee notes acknowledged, though, that the time limits imposed on motions for relief for judgment did not apply to the independent action preserved by Rule 60(b)'s savings clause.

*See* Fed. R. Civ. P. 60 advisory committee's note (1946 amendment) (''If the right to make a motion is lost by the expiration of the time limits fixed in these rules, the only other procedural remedy is by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action.''), *quoted in Beggerly*, 524 U.S. at 45; *accord Pickett v. Comanche Construction, Inc.*, 108 Nev. 422, 426-27, 836 P.2d 42, 45 (1992).

Rule 60(b) thus contains an inherent dichotomy: ''If relief may be obtained through an independent action in a [routine] case . . . , where the most that may be charged against the [judgment victor] is a failure to furnish relevant information that would at best form the basis for a Rule 60(b)(3) motion, the strict 1-year [in Nevada, six-month] time limit on such motions would be set at naught.'' *Beggerly*, 524 U.S. at 46. Addressing this dichotomy, *Beggerly* holds that ''[i]ndependent actions must, if Rule 60(b) is to be interpreted as a coherent whole, be reserved for those cases of 'injustices which, in certain instances, are deemed sufficiently gross to demand a departure' from rigid adherence to the doctrine of res judicata.'' *Id.* (quoting *Hazel-Atlas Co.*, 322 U.S. at 244). *See also NC-DSH*, 125 Nev. at 654, 218 P.3d at 858 (upholding, under NRCP 60's savings clause, relief from judgment for ''fraud upon the court'' but limiting it to '' 'that species of fraud which does, or attempts to, subvert the integrity of the court itself' ''; rejecting argument that ''fraud upon the court'' means ''any conduct of a party or lawyer of which the court disapproves; among other evils, such a formulation 'would render meaningless the [time] limitation on motions under [Rule] 60(b)(3)' '' (alterations in original) (quoting *Demjanjuk v. Petrovsky*, 10 F.3d 338, 352 (6th Cir. 1993); *Kupferman v. Consolidated Research & Mfg. Corp.*, 459 F.2d 1072, 1078 (2d Cir. 1972) (Friendly, J.))). ''[U]nder the Rule, an independent action should be available only to prevent a grave miscarriage of justice.'' *Beggerly*, 524 U.S. at 47.

The claimants in *Beggerly* sought relief by independent action from a 12-year-old quiet-title judgment. They ''allege[d] only that the United States failed to 'thoroughly search the records and make a full disclosure to the Court regarding [an early land patent] grant,' '' that, had it been disclosed before judgment, might have defeated the United States' claim of superior title. *Id.* The Court deemed it ''obvious'' that the *Beggerly* claimaints' ''allegations do not nearly approach [the] demanding [grave-miscarriage-of-justice] standard.'' *Id.* ''Whether such a claim might succeed under Rule 60(b)(3),'' the Court continued, ''we need not now decide; it surely would work no 'grave miscarriage of justice,' and perhaps no miscarriage of justice at all, to allow the judgment to stand.'' *Id.* Thus, the Court rejected the claimants' independent action for

relief from judgment and reversed the court of appeals decision allowing the action to set aside the judgment to proceed.

C.

[Headnotes 9, 10]

Bonnell's allegations do not establish a basis for an independent action for relief from judgment. Her claim is that the Lawrences and/or their lawyer committed ''misconduct and/or misrepresentation'' that led the first district judge into legal error when they invoked NRS 111.205, Nevada's statute of frauds, as grounds for summary judgment but failed to acknowledge—or ask the district court to consider—that partial performance might defeat the statute's application. She also asserts that the motion practice leading to entry of summary judgment against her in the first suit was flawed because she did not receive proper notice of the hearing time.

These allegations do not meet the requirements of a traditional equitable action for relief from judgment, much less *Beggerly*'s ''demanding standard'' of a ''grave miscarriage of justice.'' As noted, *supra* note 4, the equitable action for relief from judgment was traditionally available to redress ''fraud or act of the prevailing party, or . . . mistake or accident on the part of the losing party, unmixed with any fault of himself or his agent,'' *Royce*, 16 Nev. at 30 (quotation omitted); in addition, the losing party had to show that she did not have an adequate remedy at law and that the judgment ''ought not, in equity and good conscience, to be enforced.'' *National Surety*, 120 F. at 599. Under these standards, ''a party's failure voluntarily to disclose to the court or to his adversary the weakness of his own case or defense [was not considered] justification for vacating a judgment.'' *Villalon v. Bowen*, 70 Nev. 456, 467, 273 P.2d 409, 414 (1954) (dictum).

Bonnell had legal remedies available, moreover, that she neglected. When she received notice of entry of the summary judgment, she had the right to move within 10 days for a new trial and/or to alter or amend the judgment under NRCP 59; the right to file within 30 days a notice of appeal under NRAP 4(a)(1); and arguably the right to move for relief from judgment based on excusable neglect or ''misrepresentation or other misconduct of an adverse party'' within six months under NRCP 60(b)(1) and (3). We recognize that Bonnell was self-represented during these time periods and that, in the summary judgment setting at least, lack of explanation to a proper person litigant as to what is required to defeat a properly supported summary judgment has been held in some jurisdictions to be error cognizable on direct appeal, *see Vital v. Interfaith Medical Center*, 168 F.3d 615, 621 (2d Cir.

1999); *but cf. King v. Cartlidge*, 121 Nev. 926, 928, 124 P.3d 1161, 1163 (2005).

Nonetheless, while Bonnell alleges confusion as to the time for the summary judgment hearing, for which she blames the Lawrences and their lawyer, she does not allege that misconduct by them, personal incapacity, or other extenuating circumstance excuses her failure to act after summary judgment was entered, while her post-judgment motion and appeal times ran. *Cf.* Restatement (Second) of Judgments § 72 (1982) (incapacity plus lack of representation may provide a basis to avoid a judgment). Fundamental rules governing the finality of judgments '' 'cannot be applied differently merely because a party not learned in the law is acting pro se.' '' *Raymond J. German, Ltd. v. Brossart*, 816 N.W.2d 47, 50 (N.D. 2012) (quoting *McWethy v. McWethy*, 366 N.W.2d 796, 798 (N.D. 1985)); *Gleash v. Yuswak*, 308 F.3d 758, 761 (7th Cir. 2002) (''Even pro se litigants must follow the rules.''); *see Vanisi v. State*, 117 Nev. 330, 340, 22 P.3d 1164, 1171 (2001) (party proceeding proper person in a criminal case must comply with relevant rules of procedural and substantive law).

Finally, and most fundamentally, Bonnell alleged nothing that suggests that allowing the prior summary judgment to stand works a ''grave miscarriage of justice.'' While the Lawrences did not make Bonnell's legal argument for her, they did disclose, through Sabrina Lawrence's affidavit, the facts on which Bonnell might establish a partial-performance defense to the statute of frauds. Thus, the Lawrence affidavit acknowledged both Bonnell's $135,000 payment and the fact that Bonnell had lived, rent-free, in the Lindell premises for a time after making it.

[Headnote 11]

What Bonnell is arguing, therefore, is legal error: that she had a partial-performance argument that might have defeated summary judgment that the Lawrences did not suggest to the first judge. Bonnell's chances of success with this argument are not as great as she seems to assume. *Compare Zunino v. Paramore*, 83 Nev. 506, 509, 435 P.2d 196, 197 (1967) (partial performance will not overcome the statute of frauds unless ''proved by some extraordinary measure or quantum of evidence''), *with Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986) (''in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden''), *and Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005) (adopting *Liberty Lobby* and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). Even assuming Bonnell had a partial-performance defense to the statute of frauds, the most that can be said in terms of its nondisclosure's impact on the summary

judgment is that legal error may have occurred in the first suit. If so, Bonnell's remedy was by timely NRCP 59 motion or appeal, *Misty Management v. District Ct.*, 83 Nev. 180, 182, 426 P.2d 728, 729 (1967), not independent action for relief from judgment. *Mitchell*, 651 F.3d at 599 (a party's claim of prior legal error does not involve a ''grave miscarriage of justice'' such that ''enforcement of the judgment would be manifestly unconscionable or [present such] unusual and exceptional circumstances'' to merit disturbing the judgment's finality, especially where the party ''failed to raise his claim at earlier available opportunities'').

D.

Citing two pre-*Beggerly* decisions, *Pickett v. Comanche Construction, Inc.*, 108 Nev. at 426-27, 836 P.2d at 45, and *Nevada Industrial Development v. Benedetti*, 103 Nev. at 364, 741 P.2d at 805, Bonnell argues that she can overcome the preclusive effect of the prior summary judgment and her delay because she is proceeding by independent action, not by motion. She over-reads both decisions. In *Pickett*, relief by independent action was allowed in favor of nonparties to the underlying action who did not have notice of the judgment adversely affecting them until the time for post-judgment motions and appeal had passed. And *Benedetti* was a suit for restitutionary relief from a stipulated judgment calculated on the basis of a mutual mathematical mistake. Despite the broad language in these cases, neither holds, as Bonnell argues, that relief from judgment is available by independent action without regard to the grounds asserted therefor and the failure to have pursued other adequate legal remedies.

III.

For these reasons, we conclude that nothing in the record of the first or second suit or the pleadings suggests the threat of a ''grave miscarriage of justice'' needed to sustain an independent action for relief after all available avenues for legal relief were bypassed. Our disposition also obviates Bonnell's further argument that leave should have been given to amend the complaint, for such amendment would have been futile.

Accordingly, we affirm.

CHERRY, C.J., and HARDESTY, J., concur.

SUSAN DEBOER, IN HER CAPACITY AS THE LEGAL GUARDIAN OF GAYLE SAVAGE, AN ADULT WARD, APPELLANT, *v.* SENIOR BRIDGES OF SPARKS FAMILY HOSPITAL, INC., DBA NORTHERN NEVADA MEDICAL CENTER, A DOMESTIC CORPORATION, RESPONDENT.

No. 57107

August 9, 2012 282 P.3d 727

Appeal from a district court order dismissing a tort action. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

County public guardian brought action against hospital for negligence for financial losses sustained by mentally incompetent patient who executed general power of attorney in favor of caregiver in order to facilitate discharge, which caregiver allegedly used to misappropriate patient's assets. The district court dismissed complaint for failure to state claim, and guardian appealed. The supreme court, CHERRY, C.J., held that: (1) allegations stated claim sounding in negligence, such that hospital owed patient reasonable duty of care to prevent foreseeable harm; and (2) allegations stated adequate claim for negligence.

**Reversed and remanded.**

*Bradley Drendel & Jeanney* and *Joseph S. Bradley*, Reno, for Appellant.

*Hall Prangle & Schoonveld, LLC*, and *Tyler M. Crawford* and *David P. Ferrainolo*, Las Vegas, for Respondent.

1. APPEAL AND ERROR.
   The supreme court rigorously reviews de novo a district court order granting a motion to dismiss for failure to state claim on which relief could be granted, accepting all of the plaintiff's factual allegations as true and drawing every reasonable inference in the plaintiff's favor to determine whether the allegations are sufficient to state a claim for relief. NRCP 12(b)(5).
2. PRETRIAL PROCEDURE.
   A complaint should be dismissed for failure to state a claim only if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief. NRCP 12(b)(5).
3. TORTS.
   Immunity from liability cannot be enjoyed simply due to one's legal status.
4. HEALTH.
   A healthcare-based corporation's status as a medical facility cannot shield it from other forms of tort liability when it acts outside of the scope of medicine; instead, medical facilities should be required to conform to normal standards of reasonableness under general principles of tort law when performing nonmedical functions.

5. HEALTH.
   Medical facilities must exercise reasonable care not to subject others to an unreasonable risk of harm when acting in roles unrelated to the practice of medicine.
6. HEALTH.
   A social worker helping a patient to establish financial arrangements in effectuating a hospital patient's discharge cannot be regarded as a medical function, for the purposes of determining whether a claim against the hospital sounds in negligence or medical malpractice.
7. HEALTH.
   To prevail on a medical malpractice action, the plaintiff must demonstrate: (1) that the doctor's conduct departed from the accepted standard of medical care or practice, (2) that the doctor's conduct was both the actual and proximate cause of the plaintiff's injury, and (3) that the plaintiff suffered damages.
8. NEGLIGENCE.
   In order to prevail on a traditional negligence theory, a plaintiff must establish that (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, (3) the breach was the legal cause of the plaintiff's injuries, and (4) the plaintiff suffered damages.
9. HEALTH.
   Public guardian's allegations that hospital patient had been diagnosed with mild to moderate dementia due to Alzheimer's disease, that hospital social worker had provided patient with preprinted general power of attorney in order to obtain services following discharge, that patient thereafter executed general power of attorney in favor of caregiver in order to facilitate discharge, and that caregiver utilized power of attorney to misappropriate patient's assets adequately stated claim against hospital for negligence.

Before CHERRY, C.J., PICKERING and HARDESTY, JJ.

## OPINION

By the Court, CHERRY, C.J.:

In this appeal, we examine the duty of care owed by a medical facility when performing nonmedical functions. While we have embraced the duty owed by a medical facility towards its patients with respect to medical treatment, *see Wickliffe v. Sunrise Hospital*, 101 Nev. 542, 548, 706 P.2d 1383, 1388 (1985) (holding ''that a hospital is required to employ that degree of skill and care expected of a reasonably competent hospital in the same or similar circumstances''), we have not previously addressed whether a medical facility has a duty of care beyond the duty to provide competent medical care. We take this opportunity to recognize that when a medical facility performs a nonmedical function, general negligence standards apply, such that the medical facility has a duty to exercise reasonable care to avoid foreseeable harm as a result of its actions.

Here, the complaint alleged that appellant, a cognitively impaired patient who required a guardian to make medical and financial decisions for her, was exploited by a third party after a social worker employed by the respondent medical facility provided the third party with a preprinted general power-of-attorney form, which the patient subsequently executed in furtherance of her discharge from the facility. The manner in which the medical facility allegedly effectuated the discharge of the patient could lead a reasonable jury to find that the patient's financial injuries were a foreseeable result of the facility's conduct. Thus, the district court erred when it found that the medical facility owed the patient no duty beyond the duty to provide competent medical care and dismissed the complaint for failure to state a claim. Accordingly, we reverse the order dismissing this action and remand this case to the district court for further proceedings.

*FACTS*

Gayle Savage[1] was admitted to respondent Senior Bridges of Sparks Family Hospital, Inc., d.b.a. Northern Nevada Medical Center, after being discovered confused and wandering in a neighbor's backyard. Senior Bridges, Savage's complaint alleged, is an acute care facility specializing in the evaluation, treatment, and placement of elderly patients. Upon entering Senior Bridges, Savage apparently was diagnosed with mild to moderate dementia as a result of Alzheimer's disease. Because of Savage's condition, her doctor concluded that she needed a guardian to make medical and financial decisions for her.

One week after Savage's admission, a Senior Bridges social worker met with an individual identified as Peggy Violat Six, who offered to care for Savage upon her discharge from Senior Bridges on the condition that Savage execute a general power of attorney designating Six as her appointee for financial matters. Thereafter, Savage alleges, the Senior Bridges social worker provided Savage with a preprinted general power-of-attorney form, which Savage executed, ostensibly giving Six power over Savage's personal and financial affairs. A notary public employed by Senior Bridges purportedly verified Savage's execution and acknowledgment of the general power-of-attorney form. Savage was subsequently discharged by Senior Bridges into the care of Six, who allegedly proceeded to exploit Savage by misappropriating her money, real property, and other assets.

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[1]The named appellant in this appeal is the Washoe County Public Guardian, Susan DeBoer, who brought the action in her capacity as guardian for Gayle Savage. It is unclear from the complaint precisely when or under what circumstances DeBoer was appointed guardian of Savage.

Based on Six's alleged exploitation of Savage, the Washoe County Public Guardian, in her capacity as legal guardian of Savage, filed a complaint against Senior Bridges for negligence. The complaint asserted that Senior Bridges breached its duty of care by allowing Savage to assign a general power of attorney in favor of Six, when a reasonable investigation would have established that Savage lacked the requisite mental competence to execute a power of attorney or to protect herself from exploitation.

In response, Senior Bridges filed a motion to dismiss the complaint under NRCP 12(b)(5) for failure to state a claim upon which relief can be granted, contending that it did not have a duty to protect Savage from financial exploitation by a third party because, as a medical facility, its duty was limited to providing Savage with appropriate medical services and competent medical care. Savage opposed the motion, arguing that Senior Bridges had a duty to protect her from foreseeable harm of the type that she suffered. Alternatively, Savage asserted that Senior Bridges assumed a duty to protect her by facilitating her execution of the power-of-attorney form.

The district court granted Senior Bridges' motion to dismiss, finding that Senior Bridges did not owe Savage a duty of care beyond the duty to provide competent medical care, and asserting that it would be fundamentally unfair to hold a medical facility liable for damages resulting from actions that occurred outside the scope of the healthcare-based relationship. Moreover, the court concluded that the harm of financial exploitation was not so ''necessarily foreseeable'' as to warrant imposing a duty of care on Senior Bridges in this case. Finally, the court expressed concern that recognizing a duty to assist patients with financial planning decisions would require medical facilities to employ financial planning experts and could potentially open the floodgates of litigation.[2] This appeal followed.

## *DISCUSSION*

[Headnotes 1, 2]

This court rigorously reviews de novo a district court order granting an NRCP 12(b)(5) motion to dismiss, accepting all of the plaintiff's factual allegations as true and drawing every reasonable inference in the plaintiff's favor to determine whether the allegations are sufficient to state a claim for relief. *Sanchez v. Wal-Mart*

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[2]As this opinion addresses the duty of a medical facility to exercise reasonable care and not a specific duty to assist patients with financial planning, we disagree with the district court's concerns that hospitals will be required to employ financial planners to protect them from actions such as this one.

*Stores*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009); *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 634-35, 137 P.3d 1171, 1180 (2006). A complaint should be dismissed for failure to state a claim ''only if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief.'' *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

Savage contends that Senior Bridges owed her a duty of care beyond the duty to provide competent medical care. In particular, she claims that the social worker employed by the facility failed to exercise due care when he helped her arrange her financial affairs in furtherance of her discharge. Senior Bridges acknowledges that it owed Savage a duty of reasonable care in the treatment of her medical conditions, but argues that it did not owe Savage a duty to protect her against third-party financial exploitation.[3]

[Headnotes 3, 4]

The district court, quoting *Wickliffe v. Sunrise Hospital*, 101 Nev. 542, 548, 706 P.2d 1383, 1388 (1985), found that Senior Bridges was required to employ ''the 'degree of skill and care expected of a reasonably competent hospital in the same or similar circumstances' '' in diagnosing and treating Savage's cognitive impairments, but had no duty to assist Savage with financial decisions prior to discharge. In doing so, the district court narrowly circumscribed the legal duty that Senior Bridges owed to Savage. The district court effectively furnished Senior Bridges with full immunity from claims stemming from nonmedical injuries on its premises. This is not sound policy and does not conform to our negligence jurisprudence. *See generally Moody v. Manny's Auto Repair*, 110 Nev. 320, 333, 871 P.2d 935, 943 (1994) (holding, in the context of landowner liability, that ''all persons in this society have an obligation to act reasonably and . . . should be held to the general duty of reasonable care when another is injured''). Immunity from liability cannot be enjoyed simply due to one's legal status. *Wright v. Schum*, 105 Nev. 611, 613-14, 781 P.2d 1142, 1143 (1989). Thus, a healthcare-based corporation's status as a medical facility

[3]In her briefs filed in this court, Savage only argues under general negligence principles that Senior Bridges did not act with reasonable care in facilitating her aftercare plans. Hence, in deciding this appeal, we need not address whether a medical facility has an affirmative duty to protect its patients from the harmful acts of third parties. *See Sanchez v. Wal-Mart Stores*, 125 Nev. 818, 824, 221 P.3d 1276, 1280-81 (2009) (in Nevada, there is no duty to protect a person from the harmful conduct of a third party unless ''(1) a special relationship exists between the parties or between the defendant and the identifiable victim, and (2) the harm created by the defendant's conduct is foreseeable''); *see also Sparks v. Alpha Tau Omega Fraternity*, 127 Nev. 287, 297-98, 255 P.3d 238, 244 (2011); *Scialabba v. Brandise Constr. Co.*, 112 Nev. 965, 968-69, 921 P.2d 928, 930 (1996).

cannot shield it from other forms of tort liability when it acts outside of the scope of medicine. Instead, we establish that medical facilities should be required to conform to normal standards of reasonableness under general principles of tort law when performing nonmedical functions. Courts in other jurisdictions, including Connecticut, Louisiana, Michigan, New York, and Tennessee, have developed a similar standard. *See, e.g.*, *Gold v. Greenwich Hosp. Ass'n*, 811 A.2d 1266, 1270 (Conn. 2002) (claim was not characterized under ordinary negligence principles because it involved medical diagnosis and judgment); *Coleman v. Deno*, 813 So. 2d 303, 315 (La. 2002) (claims against a healthcare facility not arising in medical malpractice are governed by general tort law); *Dorris v. Detroit Osteopathic Hosp.*, 594 N.W.2d 455, 465 (Mich. 1999) (ordinary negligence claims ''raise issues that are within the common knowledge and experience of the jury,'' whereas medical malpractice claims ''raise questions involving medical judgment''); *Weiner v. Lenox Hill Hospital*, 673 N.E.2d 914, 916 (N.Y. 1996) (''[W]hen 'the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but the hospital's failure in fulfilling a different duty,' the claim sounds in negligence.'' (quoting *Bleiler v. Bodnar*, 479 N.E.2d 230, 235 (N.Y. 1985))); *Estate of French v. Stratford House*, 333 S.W.3d 546, 556 (Tenn. 2011) (claims sound in ordinary negligence when the act or omission complained of requires no specialized medical skills).

[Headnotes 5-7]

Aside from the wide range of medical services healthcare-based facilities provide, they also offer diverse nonmedical services to the public, including, but not limited to, aftercare planning with social workers.[4] Although such services do not fall within the scope of the duty owed by a medical facility towards its patients as contemplated in *Wickliffe*, medical facilities across this state nonetheless ''''''must exercise reasonable care not to subject others to an unreasonable risk of harm'''''' when acting in roles unrelated to the practice of medicine. *Wright*, 105 Nev. at 614, 781 P.2d at 1143 (quoting *Turpel v. Sayles*, 101 Nev. 35, 38, 692 P.2d 1290, 1292 (1985) (quoting *Sargent v. Ross*, 308 A.2d 528, 534 (N.H. 1973))). A social worker helping a patient to establish financial arrangements in effectuating the patient's discharge cannot be regarded as a medical function. *Cf. Brown v. United Blood Services*, 109 Nev. 758, 766, 858 P.2d 391, 396 (1993) (rejecting the proposition that a blood bank supplying blood from a donor infected with HIV should be held to an ordinary negligence standard). Savage's complaint was grounded in ordinary negligence, as it was

[4]The statutes pertaining to the regulation of social workers are found in NRS Chapter 641B.

not related to medical diagnosis, judgment, or treatment. As such, the district court erred in branding Savage's complaint as a medical malpractice claim.[5] Therefore, the question in this case is not whether Senior Bridges is liable to Savage as a medical facility, as the district court suggests, but rather, whether it is liable to Savage under a general negligence theory.

[Headnotes 8, 9]

In order to prevail on a traditional negligence theory, a plaintiff must establish that (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, (3) the breach was the legal cause of the plaintiff's injuries, and (4) the plaintiff suffered damages. *Klasch v. Walgreen Co.*, 127 Nev. 832, 837, 264 P.3d 1155, 1158 (2011); *see Driscoll v. Erreguible*, 87 Nev. 97, 101, 482 P.2d 291, 294 (1971) (''Negligence is failure to exercise that degree of care in a given situation which a reasonable man under similar circumstances would exercise.''). This appeal concerns only the first of these four elements—the existence of a duty of care. As discussed herein, under general negligence standards, medical facilities have a duty to exercise reasonable care to avoid foreseeable harm when they furnish nonmedical services. *See Wright*, 105 Nev. at 614, 781 P.2d at 1143. The district court erred when it determined as a matter of law, based on the pleadings alone, that Senior Bridges' actions breached its duty of reasonable care. *See Butler v. Bayer*, 123 Nev. 450, 464, 168 P.3d 1055, 1065 (2007) (''Because the question of whether reasonable care was exercised almost always involves factual inquiries, it is a matter that must generally be decided by a jury.'').

Accepting the allegations of the complaint as true and drawing inferences in favor of Savage, *Sanchez v. Wal-Mart Stores*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009), we conclude that the manner in which Senior Bridges effectuated Savage's discharge could lead a reasonable jury to find that her financial injuries were a foreseeable result of the facility's conduct. Because Senior Bridges specializes in elder care, a jury could reasonably determine that the facility should be particularly aware of concerns related to financial abuse of older, cognitively impaired patients. *See* Jane A. Black, Note, *The Not-So-Golden Years: Power of Attorney, Elder Abuse, and Why Our Laws Are Failing a Vulnerable Population*, 82 St. John's L. Rev. 289, 291 (2008) (stating that ''[f]inancial exploitation of the elderly is the third most common

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[5]The district court essentially applied a medical malpractice standard. To prevail on a medical malpractice action, the plaintiff must demonstrate: ''(1) that the doctor's conduct departed from the accepted standard of medical care or practice; (2) that the doctor's conduct was both the actual and proximate cause of the plaintiff's injury; and (3) that the plaintiff suffered damages.'' *Prabhu v. Levine*, 112 Nev. 1538, 1543, 930 P.2d 103, 107 (1996).

category—and fastest growing form—of elder abuse''); Dana Shilling, *Legal Issues of Dependent and Incapacitated People* ¶ 7.7, at 7-21 (2007) (recognizing that financial exploitation of the elderly by trustees and guardians is a significant problem); *see generally* NRS 200.5091-.50995 (defining and establishing punishments for crimes related to abuse, neglect, exploitation, and isolation of elderly and otherwise vulnerable individuals). Moreover, a jury could reasonably find that Senior Bridges was on notice that Savage was especially vulnerable to financial exploitation due to the fact that a Senior Bridges doctor had determined that Savage's dementia rendered her unable to make financial decisions for herself. *See* Matthew A. Christiansen, *Unconscionable: Financial Exploitation of Elderly Persons With Dementia*, 9 Marq. Elder's Advisor 383, 415 (2008) (stating that ''[f]inancial exploitation of elderly persons with dementia is particularly troublesome''). A jury could further find that someone in Savage's psychological condition may lack the cognitive ability to manage his or her own financial affairs, including important monetary decisions surrounding the activation of the power of attorney. *See* Julia Calvo Bueno, *Reforming Durable Power of Attorney Statutes to Combat Financial Exploitation of the Elderly*, 16 NAELA Q. 20, 20 (2003) (noting that studies have suggested a significant rate of occurrence of financial abuse through powers of attorney); Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 U. Kan. L. Rev. 245, 298 (2010) (citing one study estimating that 40 percent of elder abuse cases involve financial exploitation). In accordance with the standard negligence framework, we conclude that Senior Bridges may have breached its duty of care to Savage by not acting reasonably in facilitating the power-of-attorney forms in furtherance of discharging her from its medical facility. Accordingly, dismissal of this action for failure to state a claim was improper.

## *CONCLUSION*

The allegations in Savage's complaint, taken as true, establish a viable claim for relief. Consequently, we conclude that the district court erred in dismissing the complaint. Potential factual issues exist as to whether Senior Bridges acted negligently in overseeing Savage's release from its medical facility. Therefore, we reverse the district court's order dismissing the action against Senior Bridges and remand this case to the district court for further proceedings consistent with this opinion.

PICKERING and HARDESTY, JJ., concur.

THEODORE L. LIAPIS, PETITIONER, *v.* THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE EGAN K. WALKER, DISTRICT JUDGE, RESPONDENTS, AND MARIE JOSEPHINE LIAPIS, REAL PARTY IN INTEREST.

No. 58649

August 9, 2012 282 P.3d 733

Original petition for a writ of mandamus challenging a district court order disqualifying counsel.

Mother filed a motion to disqualify the couple's son, who represented father in divorce action. The district court ordered that son be disqualified as counsel for father, and father filed petition for a writ of mandamus. The supreme court, HARDESTY, J., as matter of apparent first impression, held that: (1) son's representation of his father in divorce action did not create a disqualifying appearance of impropriety, (2) mother lacked standing to seek disqualification of parties' son from representing his father, and (3) parties' son did not have a disabling ''pecuniary interest'' in the parties' estate.

**Petition granted.**

*Mark T. Liapis*, Reno, for Petitioner.

*Jonathan H. King*, Reno, for Real Party in Interest.

1. MANDAMUS.
   Writ of mandamus is available to compel performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control an arbitrary or capricious exercise of discretion. NRS 34.160.
2. MANDAMUS.
   Extraordinary remedy of mandamus may issue only where no plain, speedy, and adequate legal remedy exists, and the consideration of a petition for such relief is solely within the supreme court's discretion. NRS 34.170.
3. ATTORNEY AND CLIENT.
   Parties' son's representation of his father in divorce action did not create a disqualifying appearance of impropriety.
4. ATTORNEY AND CLIENT.
   An appearance of impropriety may form a basis for attorney disqualification only in the limited circumstance of a public lawyer, and only if the appearance of impropriety is so extreme as to undermine public trust and confidence in the judicial system; as distinguished from judicial recusals, which may be required on the basis of a mere appearance of impropriety, an appearance of impropriety, by itself, does not support a lawyer's disqualification.

5. ATTORNEY AND CLIENT.
Party seeking to disqualify opposing counsel bears the burden of establishing that it has standing to do so.

6. ATTORNEY AND CLIENT.
General rule is that only a former or current client has standing to bring a motion to disqualify counsel on the basis of a conflict of interest. RPC 1.7.

7. ATTORNEY AND CLIENT.
If the breach of ethics so infects the litigation in which disqualification is sought that it impacts the nonclient moving party's interest in a just and lawful determination of her claims, she may have the standing needed to bring a motion to disqualify based on a third-party conflict of interest or other ethical violation.

8. ATTORNEY AND CLIENT.
Mother lacked standing to seek disqualification of parties' son from representing his father in divorce action; mother was neither a former nor current client of her son, mother did not argue that son's representation of his father constituted an ethical breach as to her or impacted any of her legal interests, and instead, mother simply alleged that son's love for his parents impacted his ability to represent father, not mother. RPC 1.7(a).

9. ATTORNEY AND CLIENT.
Speculative contentions of conflict of interest cannot justify disqualification of counsel.

10. ATTORNEY AND CLIENT.
To the extent that a conflict of interest existed because parties' son represented his father in divorce action, father provided written informed consent that waived the conflict. RPC 1.7(b)(4).

11. ATTORNEY AND CLIENT.
Standing to seek disqualification of opposing party's counsel can arise from a breach of the duty of confidentiality owed to the complaining party, regardless of whether a lawyer-client relationship existed.

12. ATTORNEY AND CLIENT.
Lawyer owes no general duty of confidentiality to nonclients, and thus, some sort of confidential or fiduciary relationship must exist or have existed before a party may disqualify an attorney predicated on the actual or potential disclosure of confidential information.

13. PARENT AND CHILD.
Whether a confidential relationship exists for a parent-child is an issue of fact and is not presumed as a matter of law.

14. ATTORNEY AND CLIENT.
Mother did not establish that she shared a confidential or fiduciary relationship with her son sufficient to give her standing to seek son's disqualification from representing his father in divorce action; mother-son relationship, standing alone, did not establish a confidential relationship, and mother did not show that parties' son acquired any privileged, confidential information from mother.

15. DESCENT AND DISTRIBUTION.
While all children may have an expectancy in their parents' estate, no child has a pecuniary right to his or her parents' estate.

16. ATTORNEY AND CLIENT.
Parties' son did not have a disabling ''pecuniary interest'' in the parties' estate so as to warrant disqualifying son from representing his father

in divorce action; while all children might have an expectancy in their parents' estate, no child has a pecuniary right to his or her parents' estate, and a pecuniary interest, without more, does not create a confidential or fiduciary relationship requiring disqualification.

17. ATTORNEY AND CLIENT.

The district court manifestly abused its discretion when it disqualified parties' son from representing his father in divorce action based on his status as a potential witness when the case had not yet reached the trial phase. RPC 3.7(a).

Before CHERRY, C.J., PICKERING and HARDESTY, JJ.

## OPINION

By the Court, HARDESTY, J.:

This original petition for a writ of mandamus raises two novel issues regarding attorney disqualification: should an attorney who represents one of his parents in a divorce action between both parents be disqualified either (1) because the attorney's representation will constitute an appearance of impropriety or (2) because representing the parent will violate the concurrent-conflict-of-interest rule in Nevada Rule of Professional Conduct (RPC) 1.7? Because appearance of impropriety is no longer recognized by the American Bar Association, and we have not recognized the appearance of impropriety as a basis for disqualifying counsel except in the limited circumstance of a public lawyer, we reject that conclusion when the alleged impropriety is based solely on a familial relationship with the attorney. We also conclude that absent an ethical breach by the attorney that affects the fairness of the entire litigation or a proven confidential relationship between the nonclient parent and the attorney, the nonclient parent lacks standing to seek disqualification under RPC 1.7.

### *FACTS AND PROCEDURAL HISTORY*

Real party in interest Marie Liapis filed a complaint for divorce against petitioner Theodore Liapis, in which she also sought disposition of the couple's property, permanent spousal support, and her attorney fees and costs. Theodore answered Marie's complaint in proper person but later retained Mark Liapis, the couple's son, as his attorney.

A settlement conference was scheduled, and each party filed a statement in preparation for that conference. In her statement, Marie objected to Mark's representation of Theodore. Because of the issues raised concerning Mark's representation of Theodore, the district court vacated the scheduled settlement conference and gave Mark time to determine whether he would continue as Theodore's counsel.

Mark informed Marie's counsel that he did not intend to withdraw as counsel for Theodore. Marie subsequently filed a motion to disqualify Mark, asserting three bases for his disqualification. First, she argued that Mark's representation of Theodore and his pecuniary interest in their estate created an appearance of impropriety. Second, she argued that even though Mark had never represented her, there was an ''inherent conflict of interest'' because it was unclear ''how [Mark] would be able to zealously represent [Theodore]'' when he ''professe[d] to still love both his parents.'' Finally, she contended that Mark should be disqualified because he was a potential witness in the case.

In response, Theodore argued that Marie's ''boilerplate generalities'' were insufficient to mandate Mark's disqualification, and that Mark had no pecuniary interest in the couple's estate. Further, Theodore argued that there was no concurrent conflict of interest under RPC 1.7 because Mark had never represented Marie and, even if Theodore could raise a conflict, he waived it through a written informed consent. Finally, he argued that Mark could not be disqualified as a potential witness because the case was still in the pretrial phase, and under *DiMartino v. District Court*, 119 Nev. 119, 121-22, 66 P.3d 945, 946-47 (2003), potential witnesses can serve as pretrial counsel.

While the district court acknowledged Marie's argument regarding the appearance of impropriety, it reached no conclusion about whether Mark's representation created such an appearance. The district court then referred to RPC 1.7, which governs concurrent conflicts of interest, and found ''that Mark['s] representation of his father will [not] provide competent and diligent representation unaffected by the fact that his mother is the adverse party.'' Finally, the district court cited RPC 3.7, which governs attorneys as witnesses, and concluded that the ''exclusion of Mark . . . as a witness in this case will not work substantial hardship on [Theodore].[1] Therefore, Mark . . . can only serve as a witness in this case when he is disqualified or dismissed as the attorney of record.'' The district court ordered that Mark be disqualified as counsel, and Theodore filed this writ petition.[2]

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[1]Presumably, the district court meant that the exclusion of Mark as an *attorney* would not work a substantial hardship on Theodore.

[2]Mark represents Theodore in the writ petition before this court. Marie requests that ''serious consideration be given to striking the Petition because Mark [is representing Theodore in this petition but] has been disqualified from further representation.'' However, this court has permitted a disqualified attorney to represent the petitioner before this court when challenging a disqualification order, *see, e.g.*, *Nevada Yellow Cab Corp. v. Dist. Ct.*, 123 Nev. 44, 48, 152 P.3d 737, 740 (2007); *Millen v. Dist. Ct.*, 122 Nev. 1245, 1250, 148 P.3d 694, 698 (2006); *Brown v. Dist. Ct.*, 116 Nev. 1200, 1203-04, 14 P.3d 1266, 1269 (2000), and thus, we decline to strike the petition.

*DISCUSSION*

In resolving this writ petition, we must determine whether representation by a child of one of the opposing parents in a divorce action creates a disqualifying appearance of impropriety, whether a nonclient has standing to assert the concurrent-conflict-of-interest rule in RPC 1.7, and whether an attorney can be disqualified during the pretrial phase based on his status as a potential witness.

*Standard for writ relief*

[Headnotes 1, 2]

''A writ of mandamus is available to compel performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control an arbitrary or capricious exercise of discretion.'' *Millen v. Dist. Ct.*, 122 Nev. 1245, 1250, 148 P.3d 694, 698 (2006); *see* NRS 34.160. The extraordinary remedy of mandamus may issue only where no plain, speedy, and adequate legal remedy exists, *Millen*, 122 Nev. at 1250-51, 148 P.3d at 698; NRS 34.170, and the consideration of a petition for such relief is solely within our discretion. *Millen*, 122 Nev. at 1251, 148 P.3d at 698. We have previously indicated that a petition for mandamus relief generally is an appropriate means to challenge district court orders regarding attorney disqualification. *Id.*; *see also Nevada Yellow Cab Corp. v. Dist. Ct.*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007). Thus, we exercise our discretion to consider this writ petition.

*Mark's representation of Theodore does not create a disqualifying appearance of impropriety*

[Headnote 3]

Although the district court did not base its disqualification order on Mark's representation of Theodore creating an appearance of impropriety, Marie opposes writ relief on the ground that ''Canon 9 of the [Model] Code of Professional Responsibility adopted by the American Bar Association provides that a lawyer should avoid *even the appearance* of professional impropriety,'' and the ''son of opposing litigants in the same litigation cannot avoid the appearance of impropriety,'' particularly because Mark ''has a potential pecuniary interest as a future heir.''

While ''Canon 9 required attorneys to 'avoid even the appearance of impropriety[,]' [t]he ABA Model Code has since been replaced by the ABA Rules of Professional Conduct, which expressly eliminated the 'appearance of impropriety' standard.'' *In re 7677 East Berry Ave. Associates, L.P.*, 419 B.R. 833, 845 (Bankr. D. Colo. 2009); *see also MJK Family v. Corp. Eagle Management*

*Services*, 676 F. Supp. 2d 584, 593 (E.D. Mich. 2009) (noting that while the ''former Code of Professional Responsibility . . . expressly prohibited the 'appearance of impropriety[,]' . . . . [t]hat ambiguous standard has long been abandoned''); *In re Wheatfield Business Park LLC*, 286 B.R. 412, 421 (Bankr. C.D. Cal. 2002) (''Except for the states where attorney conduct is still governed by the ABA Model Code of Professional Responsibility (which the ABA Model Rules replaced in 1983), United States lawyers are no longer subject to a rule requiring them to avoid conduct that creates the appearance of impropriety.''). This is significant because Nevada adopted the Model Rules of Professional Conduct with only slight variations in 1986 as SCR 150-203.5, since renumbered to track the ABA Model Rules numbering scheme. *In the Matter of Amendments to the Supreme Court Rules of Professional Conduct, SCR 150-203.5*, ADKT 370 (Order Repealing Rules 150-203.5 of the Supreme Court Rules and Adopting the Nevada Rules of Professional Conduct, February 6, 2006).

[Headnote 4]

In fact, Nevada has expressly declined to adopt Canon 9 of the Model Code. *Brown v. Dist. Ct.*, 116 Nev. 1200, 1204 n.4, 14 P.3d 1266, 1269 n.4 (2000). Rather, this court has recognized that an appearance of impropriety may form a basis for attorney disqualification only in the limited circumstance of a public lawyer, and only if the appearance of impropriety is so extreme as to undermine public trust and confidence in the judicial system. *See id.* (declining to conclude that any alleged appearance of impropriety in that case met such a standard); *Collier v. Legakes*, 98 Nev. 307, 310, 646 P.2d 1219, 1221 (1982) (addressing this standard in the context of a government attorney). Thus, generally, ''[a]s distinguished from judicial recusals, which may be required on the basis of a mere appearance of impropriety, such an appearance of impropriety by itself does not support a lawyer's disqualification.'' *DCH Health Services Corp. v. Waite*, 115 Cal. Rptr. 2d 847, 850 (Ct. App. 2002) (internal citation and quotation omitted).

*Marie lacks standing to seek Mark's disqualification pursuant to RPC 1.7*

RPC 1.7(a) prohibits a lawyer from representing a client ''if the representation involves a concurrent conflict of interest.'' Such a conflict exists if ''[t]here is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.'' RPC 1.7(a)(2). However, even if a conflict arises, the rule also provides that ''a lawyer may represent a client if . . . [t]he lawyer reasonably believes that the

lawyer will be able to provide competent and diligent representation to each affected client; . . . [t]he representation is not prohibited by law; . . . [and e]ach affected client gives informed consent, confirmed in writing.'' RPC 1.7(b)(1), (2), (4).

[Headnotes 5, 6]

Before we can consider the merits of the concurrent-conflict rule, we first address Marie's standing to seek Mark's disqualification. The party seeking to disqualify bears the burden of establishing that it has standing to do so. *See, e.g.*, *Great Lakes Const., Inc. v. Burman*, 114 Cal. Rptr. 3d 301, 307 (Ct. App. 2010). ''The general rule is that only a former or current client has standing to bring a motion to disqualify counsel on the basis of a conflict of interest.'' Model Rules of Prof'l Conduct R. 1.7 annot. (RPC 1.7 is identical to the model rule); *see also Great Lakes Const., Inc.*, 114 Cal. Rptr. 3d at 307 (''Generally, before the disqualification of an attorney is proper, the complaining party must have or must have had an attorney-client relationship with that attorney.''). Marie is neither a former nor current client of Mark.

[Headnotes 7-10]

However, some courts have permitted nonclients to bring a motion to disqualify an attorney in limited circumstances. First, if the breach of ethics ''so infects the litigation in which disqualification is sought that it impacts the [nonclient] moving party's interest in a just and lawful determination of her claims, she may have the . . . standing needed to bring a motion to disqualify based on a third-party conflict of interest or other ethical violation.'' *Colyer v. Smith*, 50 F. Supp. 2d 966, 971-72 (C.D. Cal. 1999) (discussing prudential, as well as constitutional, standing). Here, Marie alleges simply that Mark's love for his parents impacts his ability to represent *Theodore*, not Marie. In this, Marie does not argue that Mark's representation of Theodore constitutes an ethical breach as to her or impacts any of her legal interests. Thus, Marie has failed to establish that some '' 'specifically identifiable impropriety' '' occurred, *Brown*, 116 Nev. at 1205, 14 P.3d at 1270 (quoting *Cronin v. District Court*, 105 Nev. 635, 641, 781 P.2d 1150, 1153 (1989), *disavowed on other grounds by Nevada Yellow Cab*, 123 Nev. at 54 n.26, 152 P.3d at 743 n.26), and '' '[s]peculative contentions of conflict of interest cannot justify disqualification of counsel.' '' *DCH Health Services*, 115 Cal. Rptr. 2d at 850 (quoting *Smith, Smith & Kring v. Superior Court*, 70 Cal. Rptr. 2d 507, 512 (Ct. App. 1997)). Further, to the extent that a conflict of interest existed, Theodore, Mark's only client in this matter, provided written informed consent that waived the conflict in accordance with RPC 1.7(b)(4). Because several of the Nevada Rules of Profes-

sional Conduct permit an attorney to represent a family member,[3] and no rule prohibits Mark's conduct in this case, no ethical breach ''infects the litigation,'' *Colyer*, 50 F. Supp. 2d at 971-72, which would provide a basis for Marie to bring a motion to disqualify Mark.

[Headnotes 11, 12]

Next, ''[s]tanding [can] arise[ ] from a breach of the duty of confidentiality owed to the complaining party, regardless of whether a lawyer-client relationship existed.'' *DCH Health Services*, 115 Cal. Rptr. 2d at 849. However, ''a lawyer owes no general duty of confidentiality to nonclients.'' *Id.* ''Thus, some sort of confidential or fiduciary relationship must exist or have existed before a party may disqualify an attorney predicated on the actual or potential disclosure of confidential information.'' *Great Lakes*, 114 Cal. Rptr. 3d at 308; *see also Oaks Management Corp. v. Superior Court*, 51 Cal. Rptr. 3d 561, 571 (Ct. App. 2006) (''[W]hen no attorney-client relationship exists '[m]ere exposure to the confidences of an adversary does not, standing alone, warrant disqualification.' '' (second alteration in original) (quoting *In re Complex Asbestos Litigation*, 283 Cal. Rptr. 732, 742 (Ct. App. 1991))).

[Headnotes 13, 14]

Mark and Marie's mother-son relationship, standing alone, does not establish a confidential relationship. *See U.S. v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991) (''[M]ore than the gratuitous reposal of a secret to another who happens to be a family member is required to establish a fiduciary or similar relationship of trust and confidence.''); *Latty v. St. Joseph's Society*, 17 A.3d 155, 161 (Md. Ct. Spec. App. 2011) (''While some confidential relationships arise if there is a familial relationship, 'the mere existence of a familial relationship is not indicative of a confidential relationship.' '' (quoting *Orwick v. Moldawer*, 822 A.2d 506, 512 (Md. Ct. Spec. App. 2003))); *Economopoulos v. Kolaitis*, 528 S.E.2d 714, 718 (Va. 2000) (''A parent-child relationship, standing alone, is insufficient to create a confidential or fiduciary relationship.''). And although a fiduciary relationship ''is particularly likely to exist when there is a family relationship,'' *Perry v. Jordan*, 111 Nev. 943, 947, 900 P.2d 335, 338 (1995), ''[a] family relationship, of itself, does not create a fiduciary relationship'' unless it is established by additional facts. *Simpson v. Dailey*, 496 A.2d 126,

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[3]For example, RPC 1.8(c) prohibits a lawyer from soliciting a substantial gift from the client, unless the lawyer ''is related to the client.'' RPC 7.3(a) prohibits an attorney from ''solicit[ing for pecuniary gain] professional employment from a prospective client with whom the lawyer has no family . . . relationship.''

128 (R.I. 1985); *Texas Bank and Trust Co. v. Moore*, 595 S.W.2d 502, 508 (Tex. 1980). Rather, ''[w]hether a confidential relationship exists for a parent-child . . . is an issue of fact and is not presumed as a matter of law.'' *Latty*, 17 A.3d at 161 (internal quotations omitted); *see also Dino v. Pelayo*, 51 Cal. Rptr. 3d 620, 624 (Ct. App. 2006) (''Whether a confidential relationship exists [for purposes of nonclient standing] is a question of fact.'').

Neither party argues that Mark and Marie share some type of legally recognizable confidential relationship, and Marie offered no evidence to the district court that Mark acquired any privileged, confidential information from Marie. In *Brown*, this court concluded that ''disqualification is not warranted absent proof of a reasonable probability that counsel *actually acquired* privileged, confidential information.'' 116 Nev. at 1202, 14 P.3d at 1267 (emphasis added). Similarly, in the context of familial relationships, other courts have declined to disqualify counsel absent proof that counsel actually acquired confidential information from a family member. *See, e.g.*, *Addam v. Superior Court*, 10 Cal. Rptr. 3d 39, 42 (Ct. App. 2004) (holding in a marital dissolution action that a sibling relationship between a husband's attorney and a wife's former physician was insufficient to disqualify the attorney and explaining that ''[the attorney's] brother presumably possesses confidential information relating to [the] wife; but there is no evidence that he disclosed any such information to his sister''); *DCH Health Services*, 115 Cal. Rptr. 2d at 850-51 (declining to disqualify an attorney whose wife obtained confidential information about the adverse party and noting that ''[s]ociety has entrusted lawyers with confidences, and we should not assume that lawyers will violate these confidences when involved in particular relationships''). Thus, Marie has not established that she shared a confidential or fiduciary relationship with Mark sufficient to give her standing to seek his disqualification.

[Headnotes 15, 16]

Nor has Marie demonstrated that Mark has a disabling ''pecuniary interest'' in the couple's estate. While all children may have an expectancy in their parents' estate, no child has a pecuniary right to his or her parents' estate. *See, e.g.*, *In re Estate of Melton*, 128 Nev. 34, 46-47, 272 P.3d 668, 677 (2012) (explaining that under certain circumstances, disinheritance clauses can be enforced); NRS 133.170 (omission of a child from a will is deemed intentional). And even if Marie had demonstrated such an interest, a pecuniary interest, without more, does not create a confidential or fiduciary relationship requiring disqualification. Thus, while a child's decision to represent one of his or her parents in a divorce

proceeding may appear unusual, we conclude that Marie's argument lacks merit.

*Mark's status as a potential witness during the pretrial phase does not warrant disqualification*

[Headnote 17]

While RPC 3.7(a) prohibits, with exceptions, a lawyer from acting ''as advocate at a trial in which the lawyer is likely to be a necessary witness,'' we have previously determined that RPC 3.7 does not disqualify an attorney from the case entirely. In *DiMartino v. District Court*, 119 Nev. 119, 66 P.3d 945 (2003), this court held that RPC 3.7 ''does not mandate complete disqualification of an attorney who may be called as a witness; by its plain terms, [it] simply prohibits the attorney from appearing as trial counsel.'' *Id*. at 121, 66 P.3d at 946. Thus, this court held that ''a lawyer who is likely to be a necessary witness may still represent a client in the pretrial stage.'' *Id*. at 121-22, 66 P.3d at 946-47. Because of this court's holding in *DiMartino*, we conclude that the district court manifestly abused its discretion when it disqualified Mark based on his status as a potential witness when the case had not yet reached the trial phase.

Accordingly, we conclude that the district court manifestly abused its discretion when it disqualified Mark. *Nevada Yellow Cab Corp*. *v. Dist*. *Ct.*, 123 Nev. 44, 54, 152 P.3d 737, 743 (2007) (''[A] district court's discretion in [disqualification] matters is broad and . . . its decision will not be set aside absent a manifest abuse of that discretion.''). We grant Theodore's petition for extraordinary relief and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order granting Marie's motion to disqualify Mark as Theodore's counsel.[4]

CHERRY, C.J., and PICKERING, J., concur.

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[4]We deny Marie's request to strike portions of the writ petition and the corresponding appendix.

WASHOE COUNTY, NEVADA, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, APPELLANT, *v.* CHARLES E. OTTO; V PARK, LLC; MARYANNE INGEMANSON; TODD LOWE; AND THE VILLAGE LEAGUE TO SAVE INCLINE ASSETS, INC., RESPONDENTS.

No. 56253

August 9, 2012 282 P.3d 719

Appeal from a district court order dismissing a petition for judicial review of a State Board of Equalization tax decision. First Judicial District Court, Carson City; James E. Wilson, Judge.

County filed petition for judicial review concerning decision of State Board of Equalization, which affirmed determination of county board of equalization that approximately 300 properties' taxable values had been improperly assessed. The district court granted taxpayers' motion to dismiss. County appealed. The supreme court, HARDESTY, J., held that: (1) under the Administrative Procedure Act (APA), it is mandatory to name all parties of record in a petition for judicial review of an administrative decision, and a district court lacks jurisdiction to consider a petition that fails to comply with this requirement, overruling *Civil Service Commission v. District Court*, 118 Nev. 186, 42 P.3d 268 (2002); (2) under the APA, taxpayers were ''parties of record''; (3) any failure to provide taxpayers with proper notice did not affect taxpayers' recognized party-of-record status; (4) County failed to comply with the APA's provision requiring that petitions for judicial review name all parties of record; and (5) original petition could not be amended outside of 30-day deadline for filing petition.

**Affirmed.**

[Rehearing denied October 16, 2012]

*Richard A. Gammick*, District Attorney, and *David C. Creekman*, Chief Deputy District Attorney, Washoe County, for Appellant.

*Morris Peterson* and *Suellen E. Fulstone*, Reno, for Respondents.

1. ADMINISTRATIVE LAW AND PROCEDURE.
   Courts generally have no inherent appellate jurisdiction over official acts of administrative agencies except where the Legislature has made some statutory provision for judicial review.
2. ADMINISTRATIVE LAW AND PROCEDURE.
   When the Legislature creates a specific procedure for review of administrative agency decisions, such procedure is controlling.

3. ADMINISTRATIVE LAW AND PROCEDURE.
   Pursuant to the Administrative Procedure Act (APA), not every administrative decision is reviewable; instead, only those decisions falling within the APA's terms and challenged according to the APA's procedures invoke the district court's jurisdiction. NRS 233B.130(1).
4. ADMINISTRATIVE LAW AND PROCEDURE.
   When a party seeks judicial review of an administrative decision, strict compliance with the statutory requirements for such review is a precondition to jurisdiction by the court of judicial review, and noncompliance with the requirements is grounds for dismissal.
5. ADMINISTRATIVE LAW AND PROCEDURE.
   To invoke a district court's jurisdiction to consider a petition for judicial review, the petitioner must strictly comply with the procedural requirements of the Administrative Procedure Act. NRS 233B.130(2).
6. STATUTES.
   When interpreting a statute, the supreme court first looks to the statute's language, and when the language used has a certain and clear meaning, the supreme court will not look beyond it.
7. STATUTES.
   The word ''must'' in a statute generally imposes a mandatory requirement.
8. ADMINISTRATIVE LAW AND PROCEDURE.
   It is mandatory under the Administrative Procedure Act to name all parties of record in a petition for judicial review of an administrative decision, and a district court lacks jurisdiction to consider a petition that fails to comply with that requirement, overruling *Civil Service Commission v. District Court*, 118 Nev. 186, 42 P.3d 268 (2002). NRS 233B.130(2)(a).
9. TAXATION.
   For purposes of provision of Administrative Procedure Act requiring that petitions for judicial review name all parties of record, taxpayers, whose parcels of real property were at issue in proceeding, were ''parties of record'' in county's proceeding before State Board of Equalization regarding decision of county board of equalization that approximately 300 properties' taxable values had been improperly assessed; taxpayers were both admitted and named as parties to administrative proceedings before State Board. NRS 233B.130(2)(a).
10. TAXATION.
    For purposes of provision of Administrative Procedure Act requiring that petitions for judicial review name all parties of record, one need not actually appear or participate to be a ''party of record'' in a real property tax case before the State Board of Equalization; administrative code provisions governing State Board's contested cases define a party, in relevant part, as a person who was entitled to appear in a proceeding of the State Board. NRS 233B.130(2)(a); NAC 361.684(11).
11. TAXATION.
    For purposes of provision of Administrative Procedure Act requiring that petitions for judicial review name all parties of record, any failure to provide taxpayers with proper notice of county's proceedings before State Board of Equalization regarding decision of county board of equalization that approximately 300 properties' taxable values had been improperly assessed did not affect taxpayers' recognized party-of-record status in proceedings; county's argument that taxpayers were improperly afforded party status by State Board despite failure to notify them of State Board proceedings necessarily pertained to merits of its petition for judicial re-

view and, thus, even if correct, did not excuse county from complying with provision. NRS 233B.130(2)(a); NAC 361.684(11).

12. TAXATION.

County failed to comply with provision of Administrative Procedure Act requiring that petitions for judicial review name all parties of record in county's proceeding seeking judicial review of decision of State Board of Equalization that affirmed determination of county board of equalization that approximately 300 properties' taxable values had been improperly assessed, and thus district court lacked jurisdiction; petition's caption included ''Certain Taxpayers (Unidentified)'' but did not identify any individual taxpayer, and petition merely described ''certain taxpayers (unidentified)'' in body of petition as ''unidentified 'certain taxpayers' who were named as parties to the matter before the State Board.'' NRS 233B.130(2)(a); NAC 361.684(11).

13. TAXATION.

Because county's original petition for judicial review of decision of State Board of Equalization, which affirmed determination of county board of equalization that approximately 300 properties' taxable values had been improperly assessed, failed to invoke the district court's jurisdiction due to failure to name all parties of record in State Board's proceeding, original petition could not be amended outside of 30-day deadline for filing petition. NRS 233B.130(2)(a), (c).

Before the Court EN BANC.[1]

## OPINION

By the Court, HARDESTY, J.:

In this appeal, we examine the Nevada Administrative Procedure Act (APA) requirement that a petitioner name, as respondents to a petition for judicial review of an administrative decision, ''all parties of record.'' NRS 233B.130(2)(a). Because the APA grants the district court special statutory jurisdiction to review an administrative decision, we conclude that a party must strictly comply with the APA naming requirement as a prerequisite to invoking the district court's jurisdiction. Thus, when a petitioner fails to name in its petition each party of record to the underlying administrative proceedings, the petition is jurisdictionally defective and must be dismissed. Further, if the petitioner fails to invoke the district court's jurisdiction by naming the proper parties within the statutory time limit, the petition may not subsequently be amended to cure the jurisdictional defect.

### *FACTS AND PROCEDURAL HISTORY*

In March 2006, the Washoe County Board of Equalization adjusted the property tax values of approximately 300 Incline Village

[1]THE HONORABLE KRISTINA PICKERING, Justice, voluntarily recused herself from participation in the decision of this matter.

and Crystal Bay taxpayers based on a determination that those properties' taxable values had been improperly assessed. Thereafter, ''the County Board determined that by rolling back the 300 properties' taxable values, it had created an unequal rate of taxation for the 2006-2007 tax year.'' *Village League v. State, Bd. of Equalization*, 124 Nev. 1079, 1082, 194 P.3d 1254, 1257 (2008). ''Accordingly, under its regulatory duty to 'seek to equalize taxable valuation within . . . the whole county,' the County Board rolled back the taxable values for the approximately 8,700 other properties in the Incline Village and Crystal Bay areas.'' *Id.* at 1082-83, 194 P.3d at 1257 (alteration in original) (quoting NAC 361.624). The Washoe County Assessor administratively appealed the equalization decision to the State Board of Equalization, but the State Board did not immediately consider the appeal because this court had imposed a stay temporarily enjoining the rollbacks pending a decision in a related appeal concerning the assessment methods. *Id.* at 1083, 194 P.3d at 1257. After further litigation and at the taxpayers' request, this court in 2008 directed the State Board to hear the Assessor's appeal. *Id.* at 1091, 194 P.3d at 1262-63.

The State Board then scheduled a hearing on the Assessor's appeal for June 10, 2009. At that time, the Assessor was named as the appellant and the County Board was named as the respondent, and the State Board provided notice of the June 10 hearing only to them. Notably, at that point, neither Washoe County nor the Incline Village and Crystal Bay taxpayers were named as parties to the State Board proceedings. Washoe County filed a motion to intervene with the State Board, arguing that it had a substantial interest in the outcome. The day before the hearing, taxpayers, many of whom were represented by Suellen Fulstone,[2] objected to being excluded as parties to the equalization appeal before the State Board and sought an emergency stay to postpone the hearing. The taxpayers argued that they were improperly excluded as respondents and that the record was deficient because it did not include information about the 300 individual taxpayers who previously obtained rollbacks.

At the hearing, Fulstone, as well as David Creekman, counsel to the Assessor and Washoe County, discussed the party status of the taxpayers with the State Board. Creekman agreed with Fulstone that this court ''could[ not] have been any clearer in its characterization of the 8700 [taxpayers] as [r]espondents in [the] case,'' and that ''they should be named as [r]espondents.'' At least in part because of the confusion as to whether the taxpayers were proper re-

[2]Fulstone provided the State Board with agent authorization forms for many of the taxpayers who had expressly authorized her to represent them. However, the record before us does not contain agent authorization forms for most of the 8,700 taxpayers.

spondents, and because the majority of taxpayers present supported a motion to continue the case,[3] the State Board continued the hearing on the Assessor's appeal.

Later that month, the State Board re-noticed the hearing on the Assessor's appeal for July 20, 2009, stating that any taxpayer could appear or be represented by counsel. The State Board then provided an agenda for the hearing, noting that if a taxpayer or representative was not present for the hearing, the State Board could, pursuant to NAC 361.708, proceed with the hearing, dismiss the proceeding with or without prejudice, or recess the hearing. Importantly, the State Board named the taxpayers as respondents to the proceeding in ''Exhibit A'' to its agenda, an exhibit that listed the names of all the taxpayers that would be affected by the Board's decision and which of those taxpayers were represented by counsel.

On July 20, the State Board considered the Assessor's appeal. At the hearing, Washoe County addressed its pending motion to intervene in the proceedings. It argued that any decision regarding equalization could impact its fiscal health and that, therefore, it should be added as a party to the proceeding. The State Board denied the motion, at least in part because it did not believe intervention would affect Washoe County's right as an aggrieved party to petition for judicial review of its decision. After the State Board ruled on Washoe County's motion, the Assessor made several objections to the taxpayers' involvement in the proceedings. Pertinent to this appeal, the Assessor argued that (1) The Village League to Save Incline Assets, Inc., did not have standing to appear on behalf of any of the taxpayers;[4] (2) any taxpayer not represented by counsel, absent from the State Board proceedings without an excuse, or represented by Village League should not be recognized as a party; and (3) none of the 300 taxpayers who previously obtained rollbacks should be recognized as parties.

Noting that ''[e]very taxpayer . . . could be affected by [the State Board's] decision, one way or [an]other,'' the members of the State Board unanimously agreed that the taxpayers had standing, regardless of whether they were represented by counsel. Further, the State Board concluded that the 8,700 taxpayers ''are absolutely included in this process,'' and they voted unanimously to include those taxpayers in the proceedings, as well as the 300 taxpayers

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[3]Multiple taxpayers attended the hearing ''in support of . . . Fulstone and her actions,'' and several briefly spoke in support of continuing the hearing. It is unclear from the record how many taxpayers attended the hearing, although the State Board commented that there were ''a lot of people'' in attendance.

[4]The State Board had previously permitted Village League to argue on behalf of the 8,700 taxpayers. *Village League v. State, Bd. of Equalization*, 124 Nev. 1079, 1084 & n.7, 194 P.3d 1254, 1258 & n.7 (2008).

who had previously obtained rollbacks, explaining that ''[no]body should be excluded.'' They also agreed that Village League had standing. The parties then addressed the substantive issues, and the State Board decided to uphold the County Board's equalization determination ''to roll back the 8700 taxpayers of Incline Village and Crystal Bay.''

On October 9, 2009, the State Board issued a written decision in which it upheld the County Board's equalization determination. The State Board's decision specified that ''Certain Taxpayers'' had appeared in the matter through counsel and referenced ''Exhibit A'' to its decision, which, like Exhibit A to the State Board's agenda, listed the names of all the individual taxpayers affected by the decision and indicated which of those taxpayers were represented at the hearing by counsel. The State Board also instructed ''[t]he Washoe County Comptroller . . . to certify the assessment roll of the county consistent with this decision, using Exhibit A as [a] list of Taxpayers that are affected by this Decision.''

NRS 233B.130(2)(c) requires petitions for judicial review to be filed within 30 days of the State Board's decision. On November 6, 2009, Washoe County filed a petition for judicial review of the State Board's decision, in which it named in the caption ''Certain Taxpayers (Unidentified)'' as respondents, and described them in the body of the petition as ''unidentified 'certain taxpayers' who were named as parties to the matter before the State Board . . . .'' Washoe County indicated that, although the State Board had identified the taxpayers in this manner, it was unclear, even from Exhibit A, who the individual taxpayers were. In the petition, Washoe County challenged the identification of the proper parties to the State Board appeal, in addition to challenging the substantive bases for the State Board's decision.

Two taxpayers listed in ''Exhibit A'' as affected by the decision, Charles E. Otto and V Park, LLC (collectively, Otto), filed a motion to dismiss Washoe County's petition for judicial review on two grounds: (1) Washoe County lacked standing under NRS 233B.130 to bring the petition because it was not a ''party of record'' to the State Board's proceeding, and (2) Washoe County did not name all of the parties of record to the administrative proceedings because it did not identify the taxpayers who were respondents before the State Board, naming only ''Certain Taxpayers (Unidentified).'' Washoe County opposed the motion on the grounds that it had standing and that it did not know which taxpayers to name because Fulstone had not identified exactly which taxpayers she represented.

In January 2010, the district court denied the motion to dismiss, reasoning that Washoe County had standing to petition for judicial review, that ''technical derelictions do not generally preclude a party's right to review,'' and that it would not dismiss the matter

simply because Washoe County failed ''to name in the petition all affected taxpayers.'' Although the district court denied the motion to dismiss, it ordered Washoe County to name all of the affected taxpayers and serve them within 30 days, noting that Exhibit A attached to the State Board's decision included a list of taxpayers affected by the decision.

In February 2010, Washoe County filed its amended petition and recharacterized the respondent parties as ''Certain Taxpayers'' instead of ''Certain Taxpayers (Unidentified).'' Relying on NRCP 5(b), Washoe County purportedly served by mail each of the taxpayers who were listed in Exhibit A to the State Board's decision. The mailing consisted of a one-page, condensed version of the amended petition. Inexplicably, however, Washoe County did not attach Exhibit A to its amended petition or name any taxpayer individually in the caption, in the body of the amended petition, or in an attachment. Rather, it merely defined ''Certain Taxpayers'' as those people ''who were named as parties to the matter before the State Board . . . ,'' as it had done in its original petition for judicial review.

Otto filed a motion to dismiss the amended petition pursuant to NRCP 12(b)(1) (lack of jurisdiction over subject matter),[5] arguing, *inter alia*, that Washoe County failed to name any individual taxpayers as required by the district court's order.[6] Washoe County opposed the motion, arguing that it named the respondents exactly as the State Board had characterized them: as ''certain taxpayers.''

The district court granted the motion to dismiss. It found that Washoe County had failed to comply with the court's previous order granting Washoe County an opportunity to name all of the affected taxpayers and that the failure to name the taxpayers violated the statutory requirement for naming respondents in a petition for judicial review, even under a substantial compliance standard. Washoe County now appeals, arguing that the district court improperly dismissed its petition for failure to name the taxpayers.

## *DISCUSSION*

Because the underlying proceeding involved a petition for judicial review of an administrative decision, this matter is governed by the APA, codified in NRS Chapter 233B. Applying de novo review, we interpret the naming requirement set forth in

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[5]Additionally, Otto moved to dismiss the petition for judicial review pursuant to NRCP 12(b)(4) (insufficiency of service of process).

[6]Village League, Maryanne Ingemanson, and Todd Lowe also filed a statement of intent to participate in the matter and joined the motion to dismiss Washoe County's amended petition. The record shows that Ingemanson attended at least the June 10, 2009, hearing and that Fulstone argued on behalf of Village League.

NRS Chapter 233B to determine whether the district court properly dismissed Washoe County's petition. *See Webb v. Shull*, 128 Nev. 85, 88, 270 P.3d 1266, 1268 (2012) (applying de novo review when construing a statute); *see also Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009) (applying de novo review to issues of subject matter jurisdiction).

*NRS 233B.130(2)'s requirements are mandatory and jurisdictional*

[Headnotes 1, 2]

Generally, ''[c]ourts have no inherent appellate jurisdiction over official acts of administrative agencies except where the legislature has made some statutory provision for judicial review.'' *Crane v. Continental Telephone*, 105 Nev. 399, 401, 775 P.2d 705, 706 (1989). Thus, ''[w]hen the legislature creates a specific procedure for review of administrative agency decisions, such procedure is controlling.'' *Id.*; *see also Fitzpatrick v. State, Dep't of Commerce*, 107 Nev. 486, 488, 813 P.2d 1004, 1005 (1991) (applying this reasoning to the APA); 73A C.J.S. *Public Administrative Law and Procedure* § 338 (2004) (''Since jurisdiction is dependent on statutory provisions, the extent of the jurisdiction is limited to that conferred by statute, and courts may lack jurisdiction under, or in the absence of, statutory provisions.'' (footnotes omitted)).

[Headnotes 3, 4]

In Nevada, the Legislature enacted the APA to govern judicial review of many administrative decisions, permitting an aggrieved party to petition the district court for judicial review of a final agency decision in a contested case.[7] NRS 233B.130(1). However, ''[p]ursuant to the [APA] . . . , not every administrative decision is reviewable.'' *Private Inv. Licensing Bd. v. Atherley*, 98 Nev. 514, 515, 654 P.2d 1019, 1019 (1982). Instead, only those decisions falling within the APA's terms and challenged according to the APA's procedures invoke the district court's jurisdiction. *See id.* ''When a party seeks judicial review of an administrative decision, strict compliance with the statutory requirements for such review is a precondition to jurisdiction by the court of judicial review,'' and ''[n]oncompliance with the requirements is grounds for dismissal.'' *Kame v. Employment Security Dep't*, 105 Nev. 22, 25, 769 P.2d 66, 68 (1989); *see also Ultsch v. Illinois Mun. Retirement Fund*, 874 N.E.2d 1, 7 (Ill. 2007) (stating that ''[b]ecause review of a final administrative decision may be obtained only as provided by statute, a court exercises 'special statutory jurisdiction' when it

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[7]Relevant to this provision, Washoe County's standing as an aggrieved party was challenged below and on appeal, but given our determination that its petition failed to invoke the district court's jurisdiction on other grounds, we do not reach that issue.

reviews an administrative decision,'' and that ''[a] party seeking to invoke a court's special statutory jurisdiction must strictly comply with the procedures prescribed by the statute'').

[Headnote 5]

Accordingly, to invoke a district court's jurisdiction to consider a petition for judicial review, the petitioner must strictly comply with the APA's procedural requirements. Those jurisdictional procedural requirements are found in NRS 233B.130(2). That statute provides, in relevant part, that:

> 2. Petitions for judicial review *must*:
>
> (a) Name as respondents the agency and all parties of record to the administrative proceeding;
>
> (b) Be instituted by filing a petition in the district court in and for Carson City, in and for the county in which the aggrieved party resides or in and for the county where the agency proceeding occurred; and
>
> (c) Be filed within 30 days after service of the final decision from the agency.

(Emphasis added.)

[Headnotes 6-8]

Nothing in the language of that provision suggests that its requirements are anything but mandatory and jurisdictional. ''When interpreting a statute, we first look to its language,'' and when the language used has a certain and clear meaning, we will not look beyond it. *Webb*, 128 Nev. at 88-89, 270 P.3d at 1268; *see also Harris Assocs. v. Clark County Sch. Dist.*, 119 Nev. 638, 641-42, 81 P.3d 532, 534 (2003). NRS 233B.130(2) states that petitions for judicial review ''must'' name all parties of record. The word ''must'' generally imposes a mandatory requirement. *See Pasillas v. HSBC Bank USA*, 127 Nev. 462, 467, 255 P.3d 1281, 1285 (2011). Further, this court has previously held that the ''[f]iling requirements [paragraph (c) of NRS 233B.130(2)] are mandatory and jurisdictional.'' *Civil Serv. Comm'n v. Dist. Ct.*, 118 Nev. 186, 189, 42 P.3d 268, 271 (2002). Given that the word ''must'' applies to both the filing requirement of NRS 233B.130(2)(c) and the naming requirement of NRS 233B.130(2)(a), we see no reason to treat the naming requirement any differently.[8] We thus conclude that, pursuant to NRS 233B.130(2)(a), it is mandatory to name all parties of record in a petition for judicial review of an administra-

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[8]NRS 233B.130(5) permits a court, within its discretion, to extend the time for service or to dismiss certain parties to the petition for judicial review. The absence of discretionary language in NRS 233B.130(2)(a), by contrast, is significant. *See* 73 Am. Jur. 2d *Statutes* § 129 (2001) (''[T]o express or include one thing implies the exclusion of another, or of the alternative.'').

tive decision, and a district court lacks jurisdiction to consider a petition that fails to comply with this requirement.[9]

*Washoe County failed to comply with NRS 233B.130(2)(a)*

[Headnotes 9, 10]

We must now determine whether Washoe County complied with NRS 233B.130(2)(a)'s requirement to name as respondents to its petition ''all parties of record to the administrative proceeding.'' In particular, we consider whether the Incline Village and Crystal Bay taxpayers were ''parties of record,'' such that Washoe County was required to name them as respondents.

Although the APA does not describe the term ''party of record,'' NRS 233B.035 defines ''[p]arty'' as ''each person . . . named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any contested case.'' Here, at the July 2009 hearing, the State Board unanimously admitted all 9,000 taxpayers as parties, observing that ''[e]very taxpayer . . . could be affected by [the State Board's] decision, one way or [an]other.'' The State Board also named the taxpayers as parties in its pre-hearing agenda and in its post-hearing written decision. *See Checker Cab v. State, Taxicab Authority*, 97 Nev. 5, 10, 621 P.2d 496, 498 (1981) (explaining that an agency was a ''party'' because the administrative board ''effectively 'admitted' [it] as [a] part[y] to the administrative proceeding within the meaning of NRS 233B.035''). Accordingly, in the record before us, the taxpayers were both admitted and named as parties to the administrative proceedings before the State Board, making them ''parties of record.''[10]

[Headnote 11]

Nevertheless, Washoe County maintains that it was not required to name the taxpayers as respondents in its petition because they were improperly afforded party status by the State Board despite a

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[9]As recognized by the district court, in *Civil Service Commission v. District Court*, we noted that ''technical derelictions do not generally preclude a party's right to review.'' 118 Nev. 186, 189-90, 42 P.3d 268, 271 (2002) (citing *Bing Constr. v. State, Dep't of Taxation*, 107 Nev. 630, 632, 817 P.2d 710, 711 (1991)). To the extent that *Civil Service Commission* holds that a petition for judicial review that fails to comply with the NRS 233B.130(2)(a) naming requirement may nonetheless invoke the district court's jurisdiction, however, it is overruled.

[10]We recognize that generally, to be a party of record, one must enter an appearance or participate in some manner in the proceedings. *See, e.g.*, *Woodrow v. Louisville & Jefferson County Planning & Zoning Commission*, 346 S.W.2d 538, 539 (Ky. Ct. App. 1961); *Technical Employees v. Public Emp. Relations*, 20 P.3d 472, 474-75 (Wash. Ct. App. 2001); *see also Desert Valley Water Co. v. State Engineer*, 104 Nev. 718, 720-21, 766 P.2d 886, 887 (1988). However, in the context of an equalization decision, one need not actually appear or par-

failure to notify them of the State Board proceedings. We conclude that, given the State Board's determination that the taxpayers were parties and that they were given proper notice, Washoe County's argument necessarily pertains to the merits of its petition for judicial review and thus, even if correct, does not excuse Washoe County from complying with NRS 233B.130(2)(a). Any failure to provide the taxpayers with proper notice does not affect the taxpayers' recognized party-of-record status for purposes of naming them as respondents in the petition for judicial review.

[Headnote 12]

In its original petition for judicial review, Washoe County named ''Certain Taxpayers (Unidentified)'' in the caption, but did not identify any individual taxpayer.[11] Beyond the deficient caption, Washoe County's entire petition failed to identify any individual taxpayer; it merely described ''certain taxpayers (unidentified)'' in the body of the petition as ''unidentified 'certain taxpayers' who were named as parties to the matter before the State Board . . . .''[12] Because ''Certain Taxpayers (Unidentified)'' and the description thereof does not name anyone, we conclude that Washoe County failed to comply with the mandatory requirement to name the individual taxpayer parties of record in its amended petition for judicial review. As such, the district court lacked jurisdiction to consider Washoe County's original petition for judicial review. *See Kuenstler v. Kansas Dept. of Revenue*, 197 P.3d 874, 879 (Kan. Ct. App. 2008) (explaining that ''the trial court properly determined that [the petitioner's] failure to comply with the strict pleading requirements [for a petition for judicial review] deprived it of subject matter jurisdiction'').

[Headnote 13]

On appeal, the parties dispute whether Washoe County's amended petition complied with the APA requirements. Although we fail to see how merely removing ''(Unidentified)'' from the caption equates to naming the taxpayer parties of record, we need not address Washoe County's amended petition because the amended petition was filed after the APA's statutory filing deadline. As noted above, the time period for filing a petition for judi-

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ticipate to be a party. Rather, the provisions that govern contested cases before the State Board of Equalization define a party, in relevant part, as ''a person . . . *entitled to* appear in a proceeding of the State Board.'' NAC 361.684(11) (emphasis added).

[11]Washoe County also failed to name in its petition the Assessor and Village League.

[12]We note that Washoe County failed even to name the individual taxpayers that were represented by Fulstone, even though at almost every level of the proceedings, Washoe County did not dispute the party status of those particular taxpayers.

cial review is mandatory and jurisdictional. *Kame v. Employment Security Dep't*, 105 Nev. 22, 25, 769 P.2d 66, 68 (1989). Because Washoe County's original petition failed to invoke the district court's jurisdiction, it could not properly be amended outside of the filing deadline. *See, e.g.*, *Commissioner v. Bethlehem Steel Corp.*, 703 N.E.2d 680, 683 (Ind. Ct. App. 1998) (holding that when an original petition is ''statutorily defective,'' a district court does not obtain jurisdiction over it; thus, the district court ''[has] no jurisdiction to allow an amendment relating back to the original day of filing''); *Kuenstler*, 197 P.3d at 881-82 (explaining that the petitioner's ''failure to strictly comply with the [statutory] requirements . . . within the statutory period for filing his petition was a jurisdictional defect that rendered the trial court without subject matter jurisdiction'' and that ''the relation back provisions under the Code of Civil Procedure cannot operate to cure the trial court's lack of subject matter jurisdiction in an administrative action''); *Oklahoma Employment Sec. Com'n v. Carter*, 903 P.2d 868, 871 (Okla. 1995) (reasoning that because the failure to name necessary parties is a jurisdictional defect, a district court lacks jurisdiction to permit a petitioner to amend his or her petition outside the statutory time limit); *Wren v. Texas Employment Com'n*, 915 S.W.2d 506, 509 (Tex. App. 1995) (noting that ''if [one] who was a party to the proceedings before the [agency] was not made a defendant within the statutory time limit, the petition may not be amended thereafter to cure the jurisdictional defect''). We agree with these authorities and similarly conclude that even if Washoe County's amended petition cured the jurisdictional defect, it does not relate back to the original petition because it was filed four months after the State Board's decision, well after the APA's 30-day time limit.

Although the district court lacked jurisdiction to permit Washoe County to amend its petition for judicial review outside of the APA's time limit, the district court ultimately reached the right result when it dismissed Washoe County's amended petition for judicial review. Accordingly, for the reasons stated above, we affirm the district court's order dismissing Washoe County's amended petition for judicial review.[13] *LVCVA v. Secretary of State*, 124 Nev. 669, 689 n.58, 191 P.3d 1138, 1151 n.58 (2008) (''[W]e will affirm the district court if it reaches the right result, even when it does so for the wrong reason.'').

CHERRY, C.J., and DOUGLAS, SAITTA, GIBBONS, and PARRAGUIRRE, JJ., concur.

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[13]Based on our disposition, we need not reach the parties' arguments relating to whether Washoe County sufficiently served the taxpayers.